Supreme Court, U. S.
FILED
MAY 13 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1599

HELEN A. PRYOR,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

ALBERT A. RAPOPORT
1108 National Press Building
Washington, D.C. 20005
(202) 783 - 1140
Attorney for Petitioner

Friday, May 13, 1977

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

TABLE OF CONTENTS

	Page
PETITION FOR A WRIT CERTIORARI TO THE UNITED STATES COURT OF CLAIMS	1
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	8
I. The existence of unlimited power by any governmental official to remove for insubordination, and thereby deprive a federal employee of employment for refusal to take a psychiatric evaluation, as part of a fitness-for-duty examination, presents a novel question, important to the Constitutional rights of citizens who are federal employees, which has not been, but should be determined by this Court . . .	8
II. The requirements of procedural due process of the Fifth Amendment are violated by a Civil Service Commission hearing examiner in a removal proceeding of a federal employee, as petitioner herein, based on insubordination for failure of the employee to undergo a psychiatric evaluation as part of a fitness-for-duty examination request, wherein the only issue allowed at a hearing is whether the employee took the psychiatric examination, and prohibiting the employee from refuting and/or giving reasons for not taking the psychiatric examination, refusing a request of her counsel to cross-examine co-employees whose unsworn and mostly unsigned statements concerning alleged facts	

involving petitioner's mental state were sent by the agency to the CSC hearing examiner – thus becoming thereby a part of the official record 14

CONCLUSION 24

APPENDICES 1a

A Order of U. S. Court of Claims, dated Feb. 14, 1977 – denying Motion for Rehearing 1a

B Motion for Rehearing En Banc Pursuant to Rule 151 for Petitioner 2a

C Order of U. S. Court of Claims, dated Jan. 5, 1977 – granting Respondent's Motion for Summary Judgment, denying Petitioner's Motion for Summary Judgment, and dismissing Petition . . 4a

D Decision of Board of Appeals and Review U. S. Civil Service Commission, dated June 4, 1974 . . . . . 8a

E Decision of Appeals Examining Office, U.S. Civil Service Commission, dated March 5, 1974 . . . . . 16a

F Letter to Petitioner from Director of Personnel, Office of Secretary of Defense, dated March 8, 1972 . . . . . 25a

G Letter to Petitioner from Acting Director of Personnel, Office of Secretary of Defense, dated April 10, 1972 . . . . . 28a

H Letter to Petitioner from Director of Personnel, Office of Secretary of Defense, dated June 1, 1972 . . . . . 30a

Page

I Memorandum to Petitioner from D. Srull, Deputy Assistant Secretary of Defense (Resource Analysis), Office of Secretary of Defense, dated July 17, 1973 – Notice of Proposed Removal 32a

J Memorandum to Petitioner from D. Srull, Deputy Assistant Secretary of Defense (Resource Analysis), Office of Secretary of Defense, dated October 4, 1973 – Decision to Remove 36a

Appendices

TABLE OF AUTHORITIES

Constitutional Provision:

K *United States Constitution:*
Fifth Amendment 40a

Statutes, Executive Order, Regulations:

L *United States Code, Annotated:*
Title 5 – Chapter 75 – Adverse Actions
5 U.S.C.A. § 7501 . . . . . 41a
5 U.S.C.A. § 7511
Preference Eligibles – means permanent or indefinite preference eligible who completed a probationary or trial period 42a
5 U.S.C.A. § 7512 . . . . . 43a

M *Executive Order* 9830 . . . . . 44a

N *Code of Federal Regulations:*
Title 5 – Administrative Personnel, Chapter 1 – C.S.C. 50a

	Page
– Revised as of January 1, 1973 – Cover	50a
Part 752 – Adverse Actions by Agencies	
Subpart A – General Provisions	51a
Subpart B – Removal, Suspension for More Than 30 Days	52a
Part 752 – Adverse Actions by Agencies	
Subpart B – § 752.202	58a
Part 772 – Appeal to the Commission	
Subpart C – Commission's Appellate Review of actions Against Employees	60a
Part 831 – Retirement	
Subpart A – Administration and General Provisions	67a
Subpart L – Disability Retirement on Application of an Agency & Disability Retirement Appeals	68a
O *CSC Federal Personnel Manual:*	
Chapter 306 -- Selective Placement Programs – Subchapter 8. Reassignment in Lieu of Disability Retirement	74a
FPM Supplement 752-1 – Adverse Actions by Agencies –	
Subchapter S1. Action Coverage S1-1.b., S1-2, S1-3.	79a
FPM Supplement 831-1 – Retirement –	
Subchapter S10. Disability Retirement S10-1., S10-5, S10-7, S10-9	87a
S10. Filed-by-Agency Disability Retirement Procedures	90a

	Page
P *Agency Regulations:*	
OSD Administrative Instruction No. 5 – Disability Retirement	102a
OSD Administrative Instruction No. 70 – Appeals from Adverse Actions	110a
Q *Code of Federal Regulations*	
Title 5 – Administrative Personnel	
Chapter I – Civil Service Commission	'16a

Cases:

Arnett v. Kennedy, 416 U.S. 134, Justice Powell (at p. 167)	9, 14
Board of Regents v. Roth, 408 U.S. 564	13
Bonita, Inc. v. Wirtz, 369 F.2d 208	11
Butchers' Union Slaughterhouse & Livestock Co. v. Crescent City Livestock Land & Slaughterhouse Co., 111 U.S. 746	9
Cafeteria & Rest. Workers, etc. v. McElroy, 367 U.S. 886	13
Camero v. U.S., 345 F.2d 798 - dissent	12
Cruz-Casado v. U.S., U. S. Court of Claims No. 214-75, decided 4/20/77	11
Cunningham v. U.S., 549 F.2d 753	12
Fletcher v. U.S. 392 F.2d 266	22
Goldberg v. Kelly, 397 U.S. 254	14
Gonzales v. U.S., 348 U.S. 407	16
Goss v. Lopez, 419 U.S. 565	16

Page

Grannis v. Ordean, 234 U.S. 385 16

Greene v. McElroy, 360 U.S. 474 . . . . . .14, 22

Hanifan v. U.S., 354 F.2d 358 11

Leone v. U. S., 204 Ct. Cl. 334 11

McNeil v. Butz, and *Canady v. Butz*, 480 F.2d 314 22

Riccucci v. U. S., 425 F.2d 1252, reh. denied 432 F.2d 453 22

Rolles v. Civil Service Commission, et al., 512 F.2d 1319 . . 9, 16

Schmidt v. U.S., 145 Ct . Cl. 632 . . . . . .12, 15

Service v. Dulles, 354 U.S. 361 11

Slochower v. Bd. of Ed., 350 U.S. 551 reh. denied 351 U.S. 944 15

Smith v. Schlesinger, 513 F.2d 462 reh. denied 7/21/75 . . 12

Stewart v. Pearce, 484 F.2d 1031 12

Studemeyer v. Macy, 321 F.2d 386 *cert. denied*, 374 U.S. 934 12

Vitarelli v. Seaton, 359 U.S. 535 11

Wieman v. Updegraff, 344 U.S. 183, 191 12

Williams v. Zuckert, 371 U.S. 531 petition for reh., 372 U.S. 765 22

Wisconsin v. Constantineau, 400 U.S. 433 13

Page

Yick Wo v. Hopkins, 118 U.S. 356, 370 9

Other References:

Federal Civilian Work Force Statistic, Monthly Release, Jan. 1977, U.S.C.S.C., Bureau of Manpower Information Systems 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No.

HELEN A. PRYOR,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner, Helen A. Pryor, respectfully prays that a writ of certiorari be allowed by this Court for review of the order of the U. S. Court of Claims of January 5, 1977, and the order denying motion for rehearing dated February 14, 1977.

OPINIONS BELOW

The order of the U.S. Court of Claims for which review is sought is captioned, *Helen A. Pryor v. The United States*, No. 237-75. The order is dated January 5, 1977, and it granted respondent's motion for summary judgment, denied petitioner's motion for summary judgment, and dismissed the latter's petition. The order is printed as an appendix to this petition at page 4a. Petitioner's motion for rehearing was denied by an order of the U.S. Court of Claims dated February 14, 1977, and it is printed as an appendix to this petition at page 1a.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1255(1), and Rule 19(2), Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

1. Whether a federal government official has unlimited authority to request and/or order a non-probationary federal employee to undergo a psychiatric evaluation as part of a fitness-for-duty examination?

2. Whether the refusal of the employee to undergo such psychiatric evaluation can be the basis of a removal proceeding upon the ground of insubordination where the employee was not given specific reasons forming the basis of the request to undergo the psychiatric evaluation, and an opportunity to refute any such basis if such existed?

3. Whether the requirements of procedural due process of the Fifth Amendment are violated by a hearing examiner in the removal proceeding of a federal employee, based on insubordination for failure of the employee to undergo a psychiatric evaluation as part of a fitness-for-duty examination request of the agency, wherein the only

issue allowed at the hearing is whether the employee took the psychiatric examination and prohibited the employee from refuting and/or giving reasons for not taking the psychiatric examination?

4. Whether the requirements of procedural due process of the Fifth Amendment are violated in a removal proceeding of a federal employee, based on insubordination for failure of the employee to undergo a psychiatric evaluation as part of a fitness-for-duty examination request of the agency, wherein the hearing examiner refuses to allow confrontation and cross-examination of co-employees whose unsworn and unsigned statements concerning the employee's mental state are already in the record?

STATEMENT OF THE CASE

In this suit, the petitioner sought a judicial declaration of her rights, including salary and benefits, as a federal civilian employee of the Office of Secretary of Defense; and that a decision of the Board of Appeals and Review, U.S.C.S.C., affirming the recommendation of the Appeals Examining Office, which had sustained a removal action of the agency, against the petitioner for insubordination for failure to undergo a psychiatric evaluation as part of a fitness-for-duty examination, was invalid as in excess of and contrary to the Due Process Clause of The Fifth Amendment, and agency and C.S.C. regulations.

The jurisdiction of the Court of Claims rested upon the provisions of 28 U.S.C. 1491; the Civil Service Act of January 16, 1883, as amended, 22 Stat. 403(5 U.S.C. 1101, *et seq.*; 5 U.S.C. 7501 and related provisions pertaining to termination or suspension of non-probationary federal employees).

Before the removal action complained of, Helen A. Pryor was a classified civil service employee, employed by an agency of the federal government as a secretary for over twenty-seven (27) years, and was a widow of a deceased veteran of the Armed Forces of the United States. Her most recent position was with the Office of the Secretary of Defense, with a GS-8(10) rating.

During these twenty-seven years, petitioner had received numerous promotions, within-grade raises, and commendations. She had never been reprimanded or subject to any disciplinary action of any nature.

On July 18, 1973, petitioner was given a Notice of Proposed Removal, dated the previous day July 17, 1973 [App. "I", p. 32a]. She had reported back to work on July 16, 1973, pursuant to a decision in her favor of June 28, 1973 by Appeals Examining Office of the U.S. Civil Service Commission. This decision stated that the removal action (the first removal action) was fatally procedurally defective by reason of the agency's failure to give petitioner thirty (30) full days' advance written notice of the proposed action, and that the agency restore petitioner to her former position. The basis of the removal action involved herein, as well as in the first removal proceeding, arose out of the exact same set of facts, namely, insubordination for failure to submit to a psychiatric evaluation as part of a fitness-for-duty examination, after letters to petitioner from agency officials pertaining thereto, dated March 8, 1972, April 10, 1972, and June 1, 1972 [Apps. "F", "G" and "H", pp. 25a-31a, respectively]. The first letter of March 8, 1973 was sent out even before any medical examination had taken place, and by approval through a panel without any medical officer thereon. Pursuant to the letter of March 8, 1972, and on numerous occasions thereafter, petitioner sought an inquiry as to the reasons and basis of the request to undergo the fitness-for-duty examination, and especially a psychiatric evaluation, and a ruling on the validity of the request. She was promised such an inquiry and/or preliminary hearing by agency officials if she took the physical examination with an agency medical doctor, which petitioner did on March 16, 1972. Thereafter, the same agency officials stated she could not be allowed any inquiry and/or preliminary hearing into the basis and reasons for the psychiatric evaluation, or as a means of refuting the request, and no such inquiry or preliminary hearing was ever held.

The agency medical doctor who physically examined petitioner on March 16, 1972 made no entry insofar as recommending a psychiatric evaluation on the qualification form, nor any remark as per the coding instruction section attached to the form that would indicate petitioner had any emotional or psychiatric problem (*See* CSC Record – Exhibits No. 6B and No. 6C.) In addition, there was no specific statement by him that there was any need for petitioner to undergo a psychiatric evaluation.

Petitioner did not have any representative, nor did the agency ever appoint one for her at the time of the letter to her of March 8, 1972, the physical examination of March 16, 1972, and the letter of April 10, 1972.

No agency official ever discussed reassignment with or counselled petitioner pertaining to reassignment, transfer or retirement disability.

From July 16, 1973 until October 12, 1973, petitioner was forced to sit in an area that had been and was used as a storage area, worked for no one, was not given work, and was alone most of the time.

On October 4, 1973, petitioner was given a Decision to Remove, effective October 12, 1973 [App. "J", p. 36a]. The Notice of Proposed Removal, and the Decision to Remove were both promulgated and signed by the same agency official, petitioner's immediate superior.

Thereafter, petitioner elected to have an initial hearing on the matter of the removal by the Appeals Examining Office of C.S.C.

At the hearing held January 21-22, 1974, the examiner restricted the issue solely to whether petitioner had undergone a psychiatric evaluation.

Twenty-three (23) statements, letters, containing matters relating to petitioner's mental capacity and state of mind and so-called "affidavits", nineteen (19) of which were made by agency employees and officials, none of which 23 were actually under oath and thirteen (13) of the 23 were not even signed, had become a part of the official record, when sent to the Chief, Appeals Examining Office only several weeks before the hearing. This, despite a previous letter from the Chief, Appeals Examining Office to the agency advising the latter that all evidence must be disclosed and that statements of all witnesses be in affidavit form. Counsel for petitioner had written the Chief, Appeals Examining Office on October 23, 1973, notifying him that he desired to examine and cross-examine all witnesses whose statements were in the agency file (P. 230 of Part I of Record), and on three occasions during December, 1973 requesting a copy of all materials and statements in the agency's file. The reply from Chief, Appeals Examining Office was that discovery was not permitted. Copies of the twenty-three statements, letters and "affidavits" were not received by counsel for petitioner

from the agency until several days before the hearing. The agency had also requested before the hearing that these same agency employees and officials be allowed to testify. The Chief, Appeals Examining Office, permitted only three of these to testify for the agency, one of whom was petitioner's immediate supervisor who had promulgated both Notices of Removal, and the Decisions to Remove, another in personnel who had repeatedly attempted to coerce petitioner into retirement, and the last was a medical officer who was head of the Civilian Employees' Health Service of the agency and who had never medically examined, or observed the petitioner for any such purpose.

At the start of the hearing, counsel for petitioner having ascertained that the hearing examiner had reviewed the twenty-three statements, moved that she disqualify herself, which was denied. Counsel then requested that he be allowed to confront and cross-examine all agency employees and officials mentioned in the said statements, including the medical officer of the agency who had actually conducted the physical examination of petitioner on March 16, 1972, which request was denied. The hearing examiner also refused to expunge these statements from the record.

The recommendation and findings were not made by the hearing examiner who conducted the hearing, but by the Chief, Appeals Examining Office, who did not hear any of the testimony in person.

REASONS FOR GRANTING THE WRIT

I.

The evidence of unlimited power by any government official to remove for insubordination, and thereby deprive a federal employee of employment for refusal to take a psychiatric evaluation, as part of a fitness-for-duty examination, presents a novel question, important to the Constitutional rights of citizens who are federal employees, which has not been, but should be determined by this Court.

The Notice of Proposed Removal [App. "I", p. 31a] and the Decision to Remove [App. "J", p. 36a] the petitioner, both promulgated by the same person who was petitioner's superior, of which this suit complains, had several direct effects upon petitioner and her livelihood: it caused her to lose the employment with the federal government which she had held with an unblemished record for 27 years; it effectively hindered her from obtaining other employment in her chosen field as a secretary; and it exposed her to the stigma of having been removed or fired from a federal position for insubordination. The respondent has consistently asserted an unlimited authorization to do these things to petitioner, or to any other federal employee.

The decisions of the Appeals Examining Board of the Civil Service Commission [App. "I", p. 32a], the Board of Appeals and Review of the Civil Service Commission [App. "J", p. 36a], and the Court below [Apps. "C" and "A", pp. 4a and 1a, respectively] upheld the existence of such an unlimited authority on the part of the respondent.

Has such unlimited and unrestricted authority been granted to respondent by the Congress or the President? Assuming, arguendo, that Congress or the President has attempted to grant such power, would the existence of such total government control over the lives and livelihood of government employees be tolerable under the Due Process Clause of the Fifth Amendment? Petitioner asserts these questions must be answered in the negative. "For the very idea that one man may be compelled to hold his life or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." *Yick Wo v. Hopkins*, 118 U.S. 356, 370. That the right of the individual to work, free from arbitrary government interference, is included in the liberty and property protected by the due process clause is a principle to which this Court had adhered in an unbroken line of decisions, beginning with *Butchers' Union Slaughterhouse & Livestock Co. v. Crescent City Livestock Landing & Slaughterhouse Co.*, 111 U.S. 746, to the plurality opinion of Mr. Justice Rehnquist, in *Arnett v. Kennedy*, 416 U.S. 134. *See also Rolles v. C.S.C., et al.*, U.S. Ct. of Appeals, D.C. (1975), 512 F.2d 1319.

Petitioner's claim for relief presents several issues: the existence of authority for the removal herein, based on insubordination for refusal to take a psychiatric evaluation; and the extent to which such authority, if it exists, is limited by the Due Process Clause of the Fifth Amendment.

There is no specific statutory authorization for a federal agency to require an employee to undergo a fitness-for-duty examination. Authority is implied originally from

Executive Order 9830, Sec. 0.13(d) [App. "M", p. 44a]. There is no previous decision of this Court involving removal of a federal employee for insubordination for failure to take a psychiatric evaluation as part of a fitness-for-duty examination. There were no specific standards or guidelines applicable in the instant case, nor have any ever been set up by the agency or Civil Service Commission, used to determine the mental fitness for the particular job specialty of petitioner, as a secretary, or giving the employee an opportunity or inquiry or preliminary hearing to ascertain and refute the reasons giving rise to the request to undergo the psychiatric evaluation. Thus, it can be readily ascertained that the psychiatric examination may be utilized by agencies to rid themselves or force retirement of employees who encounter supervisor-employee difficulties, who avidly pursue EEO complaints, employees who "rocked the boat" in any fashion, or employees who perhaps were thought to be a little different.

In a letter to her of March 8, 1972, petitioner was told by the agency involved (Office of Secretary of Defense) that "In view of the difficulties you have had, particularly in recent weeks, we believe that it is necessary for us to have the benefit of current medical advice to determine your physical and mental capabilities for efficient performance of your duties, accordingly you are requested to report to the Civilian Employees Health Service at 8:00 A.M., March 14, 1972, R. 1E356, the Pentagon, for a fitness-for-duty examination . . . This examination will include both a physical examination and psychiatric evaluation." The alleged "difficulties" were not spelled out, and no specific or detailed reasons were given; neither was petitioner ever notified what these difficulties were, nor was she provided with any documentation thereof until the Notice of Removal of July 17, 1973 [App. "I", p. 32a].

Agency and C.S.C. regulations were alleged by petitioner to have been violated throughout for which reason or reasons the Court below should have ruled for the petitioner. *Vitarelli v. Seaton*, 359 535; *Service v. Dulles*, 354 U.S. 361; *Bonita, Inc. v. Wirtz*, 369 F.2d 208; *Leone v. U.S.*, 203 Ct. Cl. 544; *Hanifan v. U.S.*, 354 F.2d 358. *See also, Crus-Casado v. U.S.*, U.S. Court of Claims, No. 214-75, decided April 20, 1977, wherein the Court stated, at page 5, "It is elemental that an agency must follow its own regulations, and that a discharge cannot stand . . . Further, the violation of a *single regulation* is sufficient to void the separation action, so long as it is substantial and prejudicial." [Emphasis added.] These violations included: not having a representative, nor one appointed for her by the agency before the lettters were sent directing her to take the examinations involved, or at the time of the date of the scheduled examinations; no medical officer had ever agreed with agency officials that a fitness-for-duty examination was necessary before the first letter was sent out ordering the examinations; the letter of March 8, 1972 was sent out to petitioner before any medical examination of her had taken place; the agency medical doctor who physically examined petitioner did not, as specifically required, recommend a psychiatric evaluation; neither consideration of reassignment nor counseling was ever given petitioner; the notice of proposed removal *and* the decision to remove were ma'e twice by the same agency official, the second notice of proposed removal, being based on the exact same set of facts, having been made within two (2) days after petitioner returned to work pursuant to a decision of AEO of Civil Service Commission restoring her for lack of proper notice. *See* App. "N", pp. 50a-73a – Title 5, C.F.R. §752.202(f) in effect since September 1, 1974; App. "P", pp. 114a-119a – OSD Administrative Instruction No. 70 in effect since

September 14, 1974; dissent in *Camero v. U.S.*, 345 F.2d 798.

From the very beginning, petitioner sought an inquiry into or preliminary hearing on the facts and the reasons giving rise to the order or request to take the examination, insofar as the psychiatric evaluation, and she was refused time and time again by agency officials. Nor was there any procedure set up for this preliminary type of inquiry (nor is there at present), contrary to what reason, fairness and due process would seem to dictate to guard against the potential abuse inherent in the threat to and ordering of a federal employee to undergo a psychiatric examination. Such request would of necessity involve an invasion of privacy, potential professional and personal and political biases of psychiatric experts on an excuse to retire or remove the employee, as well as the caprice and whim of a supervisor. Stringent procedural safeguards are required, but lacking so as not to offer necessary and adequate protection to the employee.

Petitioner has lost the employment which she gained by twenty-seven years of loyal and distinguished service. She has, thus, been disqualified from any further federal employment, and she has found it very difficult to obtain other employment as a secretary. Officials of the government have inflicted upon her "a badge of infamy." *Wieman v. Updegraff*, 344 U.S. 183, 191. *See also, Smith v. Schlesinger*, U.S. Ct. of App. D.C., 513 F.2d 462, rehearing denied 7/21/75, where the court discusses at length the stigma of a finding of mental illness as regards employment, the danger of psychiatric judgments, and the requirement of special attention to procedural rights where the revocation is based on an alleged mental illness, citing *Stewart v. Pearce*, 484 F.2d 1031, and *Cunningham v. U.S.*, 549 F.2d 753; *Studemeyer v. Macy*, 321 F.2d 386,

cert. denied, 374 U.S. 934; *Cafeteria & Rest. Workers, etc. v. McElroy*, 367 U.S. 886; *Board of Regents v. Roth*, 408 U.S. 564; *Wisconsin v. Constantineau*, 400 U.S. 433.

More significant in evoking the exercise of this Court's jurisdiction than these individual considerations is the fact that if petitioner's superior possesses the unlimited authority he claimed and exercised against her, to request and/or order her to take a psychiatric evaluation, every civilian federal government employee is subject to the same governmental control. Total civilian employment for the federal government for January, 1977 is 2,824,005. *See* "Federal Civilian Work Force Statistics, U.S.C.S.C., Bureau of Manpower Information Systems."

Beyond these considerations is the need for protection of a priceless constitutional right – the right to earn a livelihood. Can this most fundamental right be destroyed on the basis of rumor and hearsay, caprice or whims, which the employee is not given the opportunity to refute?

The absolute and unlimited control of federal employment approved by the Court below is wholly irreconcilable with the protection of the right of employment by the provisions of the Due Process Clause of the Fifth Amendment. The freedom of employment from arbitrary interference which has been consistently sustained by this Court cannot exist alongside the decision to remove the petitioner from federal employment, which removal did not involve any illegal, unethical or immoral conduct whatsoever on her part. Any decision that the removal should prevail is a matter of such importance as to be made by this Court alone.

II.

The requirements of procedural due process of the Fifth Amendment are violated by a Civil Service Commission hearing examiner in a removal proceeding of a federal employee, as petitioner herein, based on insubordination for failure of the employee to undergo a psychiatric evaluation as part of a fitness-for-duty examination request, wherein the only issue allowed at a hearing is whether the employee took the psychiatric examination, and prohibiting the employee from refuting and/or giving reasons for not taking the psychiatric examination, refusing a request of her counsel to cross-examine co-employees whose unsworn and mostly unsigned statements concerning alleged facts involving petitioner's mental state were sent by the agency to the CSC hearing examiner – thus becoming thereby a part of the official record.

In *Greene v. McElroy*, 360 U.S. 474, the Court stated at page 496, "Where Government action seriously injures an individual and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in documentary evidence, it is even more important where the testimony of individuals whose memory might be faulty or who might in fact be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination . . . ." Therefore, the right to cross-examine witnesses and to confront witnesses in an administrative proceeding is a right of fundamental importance which exists as a requirement of due process of law. *See also, Goldberg v. Kelly*, 397 U.S. 254. The majority of the Court in *Arnett v. Kennedy*, 416 U.S. 134, stated that

in a removal proceeding involving a federal employee an evidentiary hearing was required by the Due Process Clause of the Fifth Amendment. At p. 167, Justice Powell made clear, such "an evidentiary hearing" includes "the right to present favorable witnesses, and to confront and examine adverse witnesses . . . ."

Administrative agencies may not deprive a person of his Constitutional protected rights of life, liberty, and property without notice and a hearing which is adequate and fair. *See Slochower v. Bd. of Ed.*, 350 U.S. 551, (rehearing denied 351 U.S. 944).

There is no way of determining what weight was given by the hearing examiner and/or the Chief, Appeals Examining Office, to the statements, letters, and "affidavits" of the agency officials and employees whose documents were in the Commission's file and who were not allowed to be questioned by counsel for petitioner.[1] By reason of counsel for petitioner being denied the elemental right to confront and question these persons, or to have these documents expunged from the record and from consideration, by the Appeals Examining Office, petitioner did not have the opportunity to explain away, refute, or discredit this "evidence", which was a denial of due process.

See Schmidt v. U.S., 145 Ct. Cl. 632, wherein the U.S. Court of Claims reversed for the federal employee who had refused an order of reassignment; the employee was removed for insubordination, and C.S.C. had refused to consider whether reassignment was motivated for political

---

[1] The hearing examiner was not, in fact, the author of the decision – it was the Chief, Appeals Examining Office, who did not hear or see any of the witnesses who testified, or hear argument of counsel.

considerations; the Court stating, p. 636, "If the purpose of reassignment was issued to serve political purposes and not to promote the good of the service, it was an unlawful order." And *Rolles v. Civil Service Commission, et al.*, 512 F.2d 1319, where the U.S. Court of Appeals for the District of Columbia Circuit reversed for the federal employee who had wished an opportunity to refute and contest charges, erroneously limited by the examiner, to whether he had been transferred, which issue was never in dispute. *See Goss v. Lopez*, 419 U.S. 565, quoting at p. 577 from *Grannis v. Ordean*, 234 U.S. 385, 394, "The fundamental requisite of due process of law is the opportunity to be heard."

There is no hearing where the party cannot know what evidence is considered and is not given an opportunity to test, to explain or refute. *Gonzales v. U.S.*, 348 U.S. 407.

5 C.F.R. § 772.304 (b) [App. "N", p. 61a] provides that statements of witnesses shall be by *affidavit*, when practicable, and relative to the adverse decision. To the contrary, the following twenty-three (23) material and relevant documents and statements made by then present agency and C.S.C. employees (three of these statements by two former employees of agency; one statement by non-employee of agency) and pages of Part I of C.S.C. record on the appeal of petitioner to C.S.C., were either not under affidavit or even signed, and confrontation and cross-examination pertaining thereto was prohibited by the hearing examiner, contrary to due process:

1. Pg. 61 : Memorandum For The Record of 8 March not under affidavit.
2. Pg. 62 : Changing a paragraph in the Basis for Requesting Fitness-for-Duty Examination – not signed.

3. Pg. 63-67 : Basis for Requesting Fitness-for-Duty Examination – not signed.
4. Pgs. 68-69 & again Pgs. 162-163 : Letter of Russell Murray 2d of March 13, 1972 – not under oath nor before officer having authority to administer an oath or affirmation.
5. Pg. 70 & again Pg. 164 : Letter of Russell Murray 2d of February 14, 1972 – not signed.
6. Pg. 71 : "Affidavit" of Donald W. Srull – not under oath nor before officer having authority to administer an oath or affirmation.
7. Pg. 72 : Memorandum For the Record by Srull of alleged conversation with a Mr. William Brehm – not under oath nor before officer having authority to administer an oath or affirmation.
8. Pg. 73 : "Affidavit" of Mrs. Frances H. Tucker – not under oath nor before officer having authority to administer an oath or affirmation.
9. Pg. 74 : "Affidavit" of Marjorie Glittenberg – not under oath nor before officer having authority to administer an oath or affirmation.

10. Pg. 75 : "Affidavit" of Felice E. Pohorylo – not under oath nor before officer having authority to administer an oath or affirmation.

11. Pgs. 137-142 : Statement of Joseph N. Royal – not signed.

12. Pg. 143 : Statement of Felice Pohorylo – not signed.

13. Pg. 144 : Statement of Margaret E. Reynolds – not signed.

14. Pgs. 145-146 : Statement of Marjorie Glittenberg- not signed.

15. Pgs. 147-148 : Statement of Frances H. Tucker – not signed.

16. Pg. 149 : Statement of Philip P. Pease, M.D. – not signed.

17. Pg. 150 : Statement of John M. Kamrod – not signed.

18. Pgs. 151-152 : Statement of John E. Coon – not signed.

19. Pgs. 153-155 : Statement of Donald W. Srull – not signed.

20. Pgs. 157-161 "Social History Guide" and attachment – not signed.

21. Pgs. 170-171 : A letter of Dr. O. G. Hanlon of the Mayo Clinic of December 15, 1970 – not under oath nor before officer having authority to

administer an oath or affirmation.

22. Pg. 198 : Memorandum For The Record – John E. Coon – not under oath nor before officer having authority to administer an oath or affirmation.

23. Pg. 199 : Memorandum For the Record – Margaret E. Reynolds – not under oath nor before officer having authority to administer an oath or affirmation.

By letter of October 25, 1973, the Chief, Appeals Examining Office wrote to the director of personnel of the agency, advising that all evidence must be disclosed to both parties, and that the statements of witnesses be in affidavit form. [CSC Record – Part I, pp. 229-230.]

In response, the director of personnel wrote to the Chief, Appeals Examining Office on December 12, 1973 [CSC Record – Part I, p. 130] and enclosed all of the above-mentioned unsigned and unsworn statements and documents, which were accepted into the CSC file, contrary to the aforesaid regulation.

5 C.F.R. § 772.304(c) [App. "N", p. 62a] provides that a representative of the Commission shall discuss all relevant representations and evidence with both parties and make the representations and evidence available to them for review. By letters of December 6, 1973, December 14, 1973 and December 24, 1973 from counsel for petitioner to the Chief, Appeals Examining Office, U.S. Civil Service Commission [CSC Record – Part I, pp. 124-128] requests were made for relevant representations

and evidence. These requests were denied, contrary to the said regulation, and due process, by the Chief, Appeals Examining Office [CSC Record – Part I, pp. 132-133]. Further, the Chief, Appeals Examining Office, in violation of due process, failed to accord petitioner a full and complete hearing by not allowing petitioner the right to confront and cross-examine those agency and C.S.C. witnesses who had given these various statements which were in the file [pp. 134-135, Part I of the file.] Counsel for petitioner, by letter of October 23, 1973, long in advance of the hearing date herein of January 21-22, 1974, to Chief, Appeals Examining Office [p. 230 of Part I of CSC Record] made known his request on behalf of petitioner for confrontation and cross-examination of the numerous witnesses of the agency, whose statements were already part of the proceedings against petitioner in the agency's files.

5 C.F.R. §§772.305(b) and (c)(2)&(3) [App. "N", p. 61a-62a] accorded petitioner a right to a *hearing* before the CSC's hearing examiner, *entitlement to produce witnesses*, the *right to have* the *agency make its employees available as witnesses* at the hearing when requested by the Commission after consideration of a request by the Plaintiff, the *right to introduce evidence by testimony of witnesses*, and the *right to cross-examine witnesses*.

It is submitted that petitioner was denied due process in not being accorded a full and proper hearing, by failure of the hearing examiner to allow petitioner to call, confront and cross-examine as witnesses all of those agency and C.S.C. employees who had given statements which were already in the record. These statements were certainly relevant as they allegedly gave rise to the factual basis for the request to petitioner to undergo the fitness-for-duty examination, relating to petitioner's mental health;

again, due process was denied by the hearing examiner's failing to expunge these statements from the record at the request of counsel for petitioner made at the beginning of the hearing, and limiting the issue to whether petitioner had undergone the psychiatric examination or not. [CSC Hearing Transcript – Part II, pp. 5-7.]

It is submitted that under the right to a hearing, provided by the regulations, that such encompasses a hearing in which the petitioner is accorded due process, regardless of the fact that the rules of evidence are not strictly applied. The hearing examiner and the Chief of the Appeals Examining Office improperly limited testimony to an issue of whether petitioner had been insubordinate – expressing it as whether petitioner had undergone the psychiatric evaluation or not – thereby denying petitioner a full and proper hearing into the factual and lawful basis giving rise for the request for the fitness-for-duty examination.

For the petitioner to be so limited, presupposed that the original request to take the fitness-for-duty examination was valid and lawful, and that the agency and CSC complied with applicable regulations. It is submitted that the request was not valid and lawful, and was arbitrary and unreasonable, by reason of the fact that the agency did not comply with applicable agency and C.S.C. regulations, as well as standards of due process involving notice and reasons therefor. Thus, petitioner did not have to submit to a fitness-for-duty examination, and she had a right to a hearing in which she could answer and refute the request to take the psychiatric evaluation. Counsel does not merely contend it was error for the hearing examiner and the Chief of the Appeals Examing Office to review the record prior to the hearing, which was done by them. Rather, petitioner contends that once this re-

view took place of a record containing twenty-three (23) prejudicial statements of unsigned and unsworn, single and double hearsay, there came into being the obligation on the part of the hearing examiner and the Chief, Appeals Examining Office to accord petitioner the opportunity and elementary right to combat these statements, supposedly relevant to the issue of why the fitness-for-duty examination was requested in the first place, by allowing the confrontation and cross-examination of their promulgators. Failure to do this was a denial of any semblance of a fair hearing and due process.

See *Williams v. Zuckert*, 371 U.S. 531, on petition for rehearing, 372 U.S. 765; *Fletcher v. U.S.*, 392 F.2d 266, and cases cited herein. Also, *McNeil v. Butz*, and *Canady v. Butz*, 480 F.2d 314, and the cases cited therein.

In *Riccucci v. U.S.*, decided by the U.S. Court of Claims, 425 F.2d 1252, *reh. denied* 432 F.2d 453, after quoting from *Greene v. McElroy*, cited *infra*, the court stated, at p. 1259,

> *"It would seem that if a plaintiff in private industry who is alleged to have communist connections, and who has no civil service rights, is entitled to be confronted by his accusers and has the right to cross-examine them, the same rights should be afforded to a loyal government employee with 24 years government service who has civil service rights. This is especially true where, as here, the laws and regulations specifically give him the right of confrontation and cross-examination.*
>
> *"I think the time has come, and is in fact long overdue, for this court to hold that where*

> *the regulations of a governmental agency or department provide that an accused employee has the right to be confronted by his accusers and the right to cross-examine the agency's witnesses and he demands these rights at the hearing on his discharge, the government should be required to produce the witnesses, absent a bona fide showing that they are dead, seriously ill, out of the country or otherwise unable to be present for some compelling and justifiable reason, and, if it fails to produce them or fails to make the required showing why they are absent, it should not be allowed to introduce their ex parte hearsay statements into evidence. There is nothing harsh or unreasonable about such a rule. Even if the agency does not have subpoena powers, it could, with a little effort, arrange to have the witnesses present in most cases,* and, if its efforts were unsuccessful, it could at least make the required showing of why the witnesses were not present. It seems to me that an agency should welcome such a rule. In most cases, it could be complied with easily, and, if its position prevailed at the hearing, which would no doubt be the result in practically all of the cases (judging by those that have come to my attention), its case against the employee would be all the more secure and binding. The employee would have little to complain about if this procedure were to be followed and he was given a fair and meaningful hearing." [Emphasis added.]

CONCLUSION

There was no charge or allegation against petitioner having to do with illegal, immoral or unethical conduct, lying or falsification of records or documents, negligence, or malfeasance, or incompetence in her work. Petitioner had an absolutely unblemished record of 27 years of loyal service to the government. The removal was disproportionate to the facts, at minimum.

Our system of justice does not stand for the proposition that the end justifies the means, but rather is based upon the noble idea that only when the means are fair can the end be just. This is the essence of the protections guaranteed to every citizen by the Bill of Rights.

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted. The order of the Court of Claims of the United States should be reversed, and this cause remanded to the said Court of Claims to enter an order reversing its prior order and ordering that Petitioner be reinstated to her former position with full credit for all back pay and benefits appurtenant to her former position.

Respectfully submitted,

ALBERT A. RAPOPORT
1108 National Press Building
Washington, D.C. 20005
(202) 783-1140
Attorney for Petitioner

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS
No. 237 - 75

HELEN A. PRYOR

v.

THE UNITED STATES

Before COWEN, *Chief Judge*, DAVIS and NICHOLS, *Judges*.

ORDER

This case comes before the court on plaintiff's motion, filed January 19, 1977, for rehearing *en banc* pursuant to Rules 7(d) and 151(b), requesting that the court reconsider its order of January 5, 1977, dismissing plaintiff's petition. Upon consideration thereof, together with the response in opposition thereto, and the reply allowed to be filed by plaintiff, without oral argument, by the seven active Judges of the court as to the suggestion for rehearing *en banc* under Rule 7(d), which suggestion is denied, and further having been so considered by the panel listed above as to the motion for rehearing under Rule 151(b),

IT IS ORDERED that plaintiff's said motion for rehearing be and the same is denied.

BY THE COURT

February 14, 1977

/s/ Watson Cowen
Chief Judge

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

HELEN A. PRYOR — No. 237 - 75

v.

THE UNITED STATES

MOTION FOR REHEARING EN BANC PURSUANT TO RULE 151

Comes now, Helen A. Pryor, Plaintiff in the above-entitled cause and moves this Honorable Court to reconsider its order of January 5, 1977 for the following reasons:

1. The case involves the many thousands of Government employees who may be or have been forced to undergo a psychiatric evaluation after serving continuously for more than five years (in this case, Plaintiff had continuous governmental service of over 27 years), which violates the Constitu-

Process Clause of the Fifth Amendment to the U. S. Constitution and other related amendments and was so in this instant case.

2. The request and order is a breach of the rights of privacy of these government employees, and was so in this instant case.

3. The Federal Government does not have an absolute and unqualified right to request and order a government employee as the Plaintiff in this instant case to undergo and/or take a psychiatric evaluation.

a. The Federal Government in this instant case did not follow agency rules and regulations nor rules and re-

gulations of the Civil Service Commission in its request of the Plaintiff to und ·go a psychiatric evaluation.

b. It did not allow the Plaintiff a right guaranteed to her by the Due Process Clause as mentioned before to rebut and/or call witnesses on her behalf, to confront and/or cross-examine those persons whose unsigned and unsworn statements presumably gave rise to the instigation of any request and/or order for Plaintiff to take a psychiatric evaluation, again as contrary to the Due Process Clause as mentioned before.

4. The denial to Plaintiff, situated in the said situation aforesaid of her Constitutional rights and the further order of this Court which in essence denied her these rights was in error, and should not have been used as a means to remove Plaintiff for insubordination, which removal had no relevant bearing whatsoever to her continuous, loyal, competent and devoted governmental service of over 27 years; and which removal against the said employee did not involve any illegal, unethical, or immoral conduct whatsoever on her part.

And for such other and further reasons as may be presented to the Court at a later date or hearing.

/s/ Albert A. Rapoport
ALBERT A. RAPOPORT
Attorney for Plaintiff

1108 National Press Building
Washington, D.C. 20045

APPENDIX C

IN THE UNITED STATES COURT OF CLAIMS
No. 237 - 75

HELEN A. PRYOR

v.

THE UNITED STATES

Albert A. Rapoport, attorney of record, for plaintiff.
Richard J. Webber, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before COWEN, *Chief Judge*, DAVIS and NICHOLS, *Judges*.

ORDER

This case comes before the court on the parties' cross-motions for summary judgment. Oral argument has been had and the court has considered the briefs, exhibits, and argument. The court finds that there are no disputed issues of relevant fact requiring trial (or other further fact-finding process) and that the case is ready for disposition on the parties' motions, including the exhibits.

Plaintiff, an employee of the Department of Defense, was removed in October 1973 for insubordination in that she had refused to submit to a psychiatric evaluation as part of a fitness-for-duty examination. On appeal to the

Civil Service Commission, the employing agency's determination was affirmed by the then Appeals Examining Office and thereafter by the then Board of Appeals and Review. The gravamen of her case in this court is that she was deprived of procedural protections to which she was entitled; she also claims that there was not sufficient evidence to support the finding that she had refused to submit to a psychiatric examination. We hold these contentions to be without merit and discuss her major points.

First, the Federal Personnel Manual expressly authorizes a demand that an employee undergo a psychiatric evaluation, and it is clear from the record as a whole that, before charging plaintiff with insubordination, the agency gave her ample and repeated opportunity to make herself available for the psychiatric examination which she knew was demanded of her. In this process she was plainly given the chance to select psychiatrists of her own choosing if she preferred not to be examined by federal medical officers. There is more than sufficient support for the administrative finding that she knowingly and deliberately refused to cooperate at all. She even refused to submit to a psychiatric evaluation in connection with the processing of an involuntary application the agency made to the Civil Service Commission for disability retirement (on psychiatric grounds), and the application therefore had to be dismissed by the Commission. She has continued to remain adamant in her refusal to undergo a psychiatric examination.

Second, if it is a prerequisite to such a demand (*i.e.* that the employee undergo psychiatric examination) that the agency have reason to believe that such an evaluation is appropriate or called for in determining the employee's fitness for duty, the record contains information demonstrating affirmatively that here the agency had such reason to believe. For one thing, the doctor who examined her

physically reported that he had tried to convince her that talking with the staff psychiatrist would be to her advantage and added: "My general impression is that Mrs. Pryor must have many unresolved unconscious conflicts which make her emotionally maladapted. Her thinking and judgment seems to be impaired; she is accident prone, and she appears to have false beliefs. Her attitude toward her previous accidents also includes an element of compensation neurosis."

Third, plaintiff contends that the agency was required to follow the requirements of Part 831 of 5 C.F.R. relating to disability retirement. We do not decide whether or not this was so because we conclude, as did the Board of Appeals and Review, that in any event the agency essentially and substantially complied with the 831 requirements before plaintiff was charged with insubordination in July 1973. Three agency officials plus two physicians (Drs. Mayer and Pease) were satisfied that a psychiatric examination was called for. Plaintiff selected a personal representative, an attorney, to advise her; this selection was made before the last requests that she cooperate in taking a psychiatric examination. She was clearly notified in advance of the scheduled examinations, and she was likewise given the right to submit the names of psychiatrists acceptable to her. She also had been given sufficient indication that there was a substantial question as to her psychiatric condition. Accordingly, there was no significant defect in the agency's procedures even if the requirements of Part 831 are applicable.

Fourth, no material error marred the hearing or procedures of the Civil Service Commission. In upholding the finding of insubordination the Commission did not consider or rely upon the unsworn statements of federal personnel which plaintiff challenges. There is therefore no pertinence to her points that these materials found

their way improperly into the administrative record and that plaintiff was not permitted to examine the employees who made the statements. *Cf. Pascal v. United States*, 211 Ct. Cl. _____, _____ (Oct. 20, 1976) (slip op., p. 5). Similarly, there was no abuse of discretion in limiting the number of witnesses; the hearing fairly ventilated the issues before the Commission. And it was not error to have the determination of the Appeals Examining Office signed by an official other than the examiner who conducted the hearing. *See Richman v. United States*, 206 Ct. Cl. 844, 845 (1975).

Fifth, the sanction of removal is authorized by the Federal Personnel Manual for circumstances like those present here. Since plaintiff persisted over a long period in refusing to cooperate in any proceedings involving disability, there was no abuse of discretion in deciding that separation was the only practical remedy.

We have also considered plaintiff's many other points but find that none of them vitiates the administrative determination or proceedings.

IT IS THEREFORE CONCLUDED AND ORDERED that defendant's motion for summary judgment is granted, plaintiff's motion for summary judgment is denied, and the petition is dismissed.

BY THE COURT

January 5, 1977

/s/ Watson Cowen
Chief Judge

PPENDIX D

UNITED STATES CIVIL SERVICE COMMISSION
BOARD OF APPEALS AND REVIEW
Washington, D.C. 20415

DECISION

IN THE MATTER OF

TYPE CASE: Removal

Helen A. Pryor

INTRODUCTION

The appellant, through counsel, has appealed from the decision of the Appeals Examining Office, Washington, D.C. (AEO), sustaining the action of the Department of Defense, Office of the Assistant Secretary of Defense, Washington, D.C., whereby she was removed from the position of Secretary (Stenography), GS-8, effective October 12, 1973.

STATEMENT OF THE CASE

By letter dated July 17, 1973, appellant was advised of the proposal to remove her for insubordination, based on her refusal to submit on April 25, 1972, to a psychiatric evaluation as part of a fitness-for-duty examination (FFDE). The appellant made several written replies requesting material, which the agency furnished. By letter issued October 4, 1973, the appellant was notified of the agency decision to remove her effective October 12, 1973.

The appellant subsequently appealed to the AEO and requested a hearing, which was held on January 21 and 22, 1974.

FIRST LEVEL DECISION

The AEO decision of March 5, 1974, found that the agency complied with the mandatory procedural requirements of part 752B of the Civil Service regulations in effecting appellant's removal. On the merits the AEO found that the reason given for the removal was sustained by the preponderance of the evidence of record. It further found that the sustained reason referred to a sufficiently serious matter to warrant appellant's removal and that the agency's actions were not arbitrary, unreasonable or capricious, but were for such cause as would promote the efficiency of the service.

REPRESENTATIONS TO THE BOARD

On appeal to the Board the appellant, through counsel, contends, that there are procedural errors, that she was denied due process, and that the penalty of removal was too harsh. The agency was afforded an opportunity to reply and appellant submitted representations in rebuttal to the agency's comments.

ANALYSIS AND FINDINGS

The Board has reviewed the entire record and has considered the representations of both parties. Having reviewed the record, the Board, finds, as did the AEO, that the agency complied with the mandatory procedural requirements of part 752B of the Civil Service regulations in effecting the appellant's removal. The Board finds,

contrary to appellant's contention, that the agency complied with the requirement to make available to her the material on which the charges are based and which were relied on to support the removal action. None of the documents requested by the appellant, which she did not receive, were relied on by the agency in support of the reasons in the notice of proposed removal; therefore any failure on the part of the agency to make them available to the appellant was not an abridgement of her rights. In addition the advance notice stated that she could review the material on which the agency was relying to support the reasons for her proposed removal, and where the material could be obtained.

The appellant contends that the agency failed to follow the procedures in regard to the agency initiated application for disability retirement. The Board finds that since there was no disability retirement effectuated, those procedures are not applicable to the determination in this case, which is based on part 752B of the Commission's regulations concerning removals. However, in this regard the Board finds that the agency essentially complied with the requirements to part 831 of the Commission's regulations. Section 831.1204 states in pertinent part:

> (a) The Commission office that receives the application first reviews it for compliance with the procedures in section 831.1203 (fitness-for-duty examination). . . . If there has been compliance with the required procedures, the Commission office notifies the agency and the employee . . . that it has received the application . . . .

The Commission's Bureau of Retirement, Insurance, and Occupational Health (BRIOH) acknowledged receipt of the application by letter dated September 11, 1972. Subsequently BRIOH dismissed the application for lack of sufficient medical evidence in that appellant failed to cooperate with a Commission medical officer who attempted to obtain further medical evidence by scheduling a physical examination. Since the decision of BRIOH was not appealed, the Board can not review the procedures involved in that action.

The appellant further contends that she was denied due process because she was not allowed a hearing prior to the decision of removal. In this regard the Board notes that the case cited by the appellant (*Kennedy v. Sanchez* 349 F.Supp. 863 (1972)) was reversed on appeal to the Supreme Court, *sub nom. Arnett v. Kennedy*, No. 72-118 (April 16, 1974). Therefore, whatever applicability the lower court decision may have had on the issue of an employee's right to a pre-termination evidentiary hearing was rendered nugatory by the Supreme Court decision.

With regard to appellant's contention that she was denied due process because the AEO denied her request to confront and cross-examine agency officials and employees who provided statements, letters, and affidavits relevant to the reasons giving rise to the FFDE request, the Board finds the AEO denial of certain witnesses was proper in view of the basic issue involved in the appeal: whether the appellant was insubordinate based on her refusal to submit to a psychiatric evaluation as part of a FFDE. Allowing all of the requested witnesses to testify would have resulted in introduction of testimony that was irrelevant and immaterial to the issue involved, as well as being repetitious. The record shows that the following persons did testify at the Commission hearing:

Dr. Philip P. Pease, who recommended that the appellant be evaluated by a psychiatrist before any determination is made as to her fitness for performance of her duties;

Joseph N. Royal, a member of the agency panel who determined that a FFDE was warranted;

Donald W. Srull, appellant's immediate supervisor and a member of the agency panel;

Robert White, a personnel management specialist who was called as appellant's witness.

The Board is of the opinion that the AEO properly based its decision on what witnesses to allow on the relevancy and materiality of the testimony the witnesses were expected to offer. The Board notes that the agency was also denied witnesses based on the same criteria.

Appellant also contends that the AEO Hearing Examiner, by reviewing in advance of the hearing and thereafter all of the documents of the requested witnesses, violated her rights of due process. The Board does not agree with this contention. The Hearing Examiner has a duty to be a familiar with and cognizant of the issue(s) involved, the reason(s) for the agency action, and appellant's defense(s) thereto.

The Board finds no improper consideration was given to the evidence furnished by the requested witnesses which was not relevant or material, or relied on by the agency. But even considering the proposed witnesses' testimony in a light most favorable to the appellant, the record would still show that the appellant was insubordinate for refusing to submit to a psychiatric evaluation.

With regard to appellant's contention that the proposed notice of July 17, 1973, was in essence not a proposal,

but a decision already made to remove the appellant, the appellant's supervisor and promulgator of the notice testified that he had not already made up his mind to have the appellant removed prior to issuance of the notice. He testified (Transcript-page 82) that his mind was free and open and was subject to be changed, and that he had not already reached a decision. In the Board's opinion, this is supported by the various letters sent to the appellant which stated that no decision has been made to remove the appellant, prior to the final decision letter of October 4, 1973.

Appellant also contends that she was denied due process because the AEO Hearing Examiner did not render any decision or report, so as to permit exceptions and arguments to the points presented. She concludes that since numerous other sections of the Code of Federal Regulations, title 5, concerning the Civil Service Commission, mentions that after a hearing that a hearing examiner make a recommended decision and give a copy thereof to the party involved with an opportunity to submit proposed findings and conclusions, that this requirement should apply to adverse actions under part 752B of the Civil Service regulations. Part 772, which governs appeals to the Comission, does not, however, require the procedure suggested by the appellants [sic].

With regard to the contention that the penalty of removal is unduly harsh, employing agencies of the Federal government have discretion to determine what penalities will be imposed on their employees, subject only to the requirement that penalities may not be arbitrary, capricious or unreasonable, but for such cause as will promote the efficiency of the service. Based upon review of the record, the Board finds that the penalty of removal was not unreasonable in

view of the sustained charge of insubordination, based on appellant's refusal to submit to a psychiatric evaluation.

DECISION

In view of the foregoing and all the record, the Board of Appeals and Review hereby affirms the AEO decision of March 5, 1974.

Civil Service Regulations provide that the decision of the Board is final and there is no right of further administrative appeal.

For the Commissioners:

June 7, 1974 /s/ William P. Berzak

William P. Berzak

APPENDIX E

UNITED STATES CIVIL SERVICE COMMISSION
APPEALS EXAMINING OFFICE
WASHINGTON, D.C. 20415

MAR 5 1974

APPEAL OF HELEN A. PRYOR
UNDER PART 752, SUBPART B,
OF THE CIVIL SERVICE REGULATIONS

Appeal of a removal from the position of Secretary (Stenography), GS-08/10, $13,687 per annum, Office of the Director of Defense Program Analysis and Evaluation, ODD (Resource Analysis), Washington, D.C., effective October 12, 1973.

INTRODUCTION

By letter dated October 23, 1973 Mr. Albert A. Rapoport, Attorney at Law, submitted an appeal on behalf of Mrs. Pryor. An investigation was conducted. Mrs. Pryor and Mr. Rapoport reviewed the case file on November 28, 1973, and the appellant requested a hearing. Mrs. Pryor subsequently reviewed the file on January 9 and January 18, 1974. The hearing was held in Washington, D.C. on January 21 and 22, 1974. Mrs. Pryor was represented by Mr. Rapoport and the agency was represented by Colonel David A. Fontanella and Captain Robert Miele, Attorney. Mrs. Pryor testified in her own behalf and testimony was heard from 4 other witnesses.

ANALYSIS AND FINDINGS

Appellant is a non-veteran who has completed a probationary period in the competitive service. We find that Mrs.

Pryor was entitled to appeal to the Civil Service Commission under the provisions of Part 752, Section 752.203 of the Civil Service regulations and that her appeal was timely filed.

By letter dated July 17, 1973, the agency gave Mrs. Pryor an advance notice of proposed adverse action based on the following reason:

> The reason for this proposed action is insubordination based on your refusal to submit to a psychiatric evaluation as part of a fitness-for-duty examination as follows:
>
> a. After extensive absences from 24 January 1972 - 23 February 1972, your personal and phone contacts with me and other members of the ODDPA&E staff, as well as your general behavior, indicated that you may not be able to effectively perform the duties of your position. On 8 March 1972, therefore, you were requested, by letter, to report for a medical examination on 14 March 1972 to include both a physical exam and a psychiatric evaluation, in order to determine your fitness-for-duty You were instructed to submit your list of medical specialists no later than 13 March 1972 if you preferred not to be examined by Federal Medical Officers. No list of medical specialists was received. You reported for the physical exam but did not submit to a board-certified psychiatric evaluation at that time. The examining physician's report to the Director of Personnel, dated 6 April 1972, recommended that a psychiatric evaluation be performed before any final determination be mad made as to your fitness-for-duty.

> b. By letter on 10 April 1972, you were requested to report for a psychiatric examination either at the Civilian Employee's Health service on 25 April 1972 or by a board-certified private psychiatrist chosen from a list of 3 to 5 names of your choice. You failed to report for this 25 April exam, and also failed to submit a list of private psychiatrists to whom you were willing to report for examination.
>
> c. Although Dr. John Ewan, your private physician informed Mr. Robert White in the OSD Personnel Division on 17 May 1972 that you had indicated that you might agree to examination by Dr. Robert Groh, a board-certified psychiatrist; you failed to respond to a letter from the Director of Personnel dated 1 June 1972 in which he requested your cooperation in this matter and a written reply by 6 June 1972 regarding your willingness to report for such examination. No reply was received.

We find that the reason for the proposed removal action was set forth with sufficient specificity and in sufficient detail to permit the opportunity for reply.

Mrs. Pryor was given ten calendar days from the date of receipt of the proposal letter to reply personally, in writing, or both personally and in writing, and to submit affidavits or other evidence in support of her answer. The appellant submitted memoranda replying and requesting extensions and requesting information for further more detailed replies on July 27, 1973, August 16, 1973, August 21, 1973, August 29, 1973, September 5, 1973, September 7, 1973, September 17, 1973 and September 26, 1973. The appellant states the following material was requested, but not received from the agency:

"2. All memoranda, letters, documents, and writings in possession of the agency and its officials and employees, and in its records and files concerning Mrs. Pryor.

3. A copy of the complete official and unofficial personnel file and folder(s) of Mrs. Pryor from the beginning of her Federal service to the present, and including efficiency ratings, proficiency evaluations of potential by immediate and all other supervisors.

4. Names and titles of positions of those persons who have promulgated and/or typed all materials pertinent to the basis for the proposed removal.

5. Residence addresses and present duty locations of all persons giving statements and/or affidavits pertaining to the facts herein.

6. Personnel and fitness folders of all of those in No. 5, ...

7. Copy of all medical reports, charts, memoranda, handwritten notes pertaining to the medical examination of March 16, 1972 . . . ."

In addition, the answers to questions regarding possible conversations among the appellant's supervisors and the physicians of the U. S. Army Civilian Employees' Health Service.

As the appellant's counsel was informed in our letter dated December 27, 1973, regarding further requests for this material: "Civil Service regulations provide no right of discovery in administrative appeals and we have no authority to direct an agency to provide such a right. We may nonetheless direct the agency to furnish this office with any information and documents material and relevant to the issues in the appeal."

The record reflects that the appellant was allowed to review all of the material relied on to make the proposal for her removal. The appellant was furnished a copy of her Official Personnel Folder, copies of pertinent regulations, and her doctor was furnished the medical examination reports. We find that the appellant was furnished with all the material to which she was entitled by regulation.

The agency notified Mrs. Pryor of the decision to remove her by Memorandum dated October 4, 1973, stating that after careful consideration of all of her written replies, it found the reasons for the removal to be supported by the evidence and sustained. It found that the sustained reason warranted Mrs. Pryor's removal from the service. The appellant was notified of her rights of appeal either to the Civil Service Commission or to the Director of Defense Program Analysis and Evaluation, and that her removal would be effected at close of business on October 12, 1973. The appellant was in an active duty status throughout the notice period.

We find that the agency complied with the procedural requirements of the law and the Civil Service regulations in effecting the appellant's removal.

Mrs. Pryor chose to file her appeal with the Civil Service Commission by letter dated October 23, 1973. In that submission, she contended that alleged "relevant information and materials" were withheld from her. This allegation was discussed supra. She also contends that the procedure followed in ordering the fitness-for-duty examination was improper, that there was no basis upon which to order a fitness-for-duty examination, that she was not insubordinate, that she has been harassed to force her to retire, and that her due process has been violated.

In the case before us there is one charge, and that charge is "insubordination based on your refusal to submit to a psychiatric evaluation as part of a fitness-for-duty examination." The charge is supported by two specifications which outline, in condensed form, the circumstances of the agency's requests for a psychiatric examination.

The record reflects that by letter dated March 8, 1972, the appellant was requested to report for a medical examination to include both a physical exam and a psychiatric evaluation, in order to determine her fitness-for-duty. On March 16, 1972 the physical exam was begun in the Civilian Employees' Health Service; however, at that time the appellant would not talk with the Health Service psychiatrist. The report to the Personnel Divison of the physical examination dated April 6, 1972, and signed by Phillip P. Pease, M.D., the Director of the U.S. Army Civilian Employees' Health Service recommended a psychiatric evaluation be made before a determination be made on her fitness-for-duty.

The appellant contends that because Doctor Pease was not the examining physician, he was not competent to make a valid report to Personnel. Dr. Pease stated in this regard at the Commission hearing (HT, p. 37) that the basis for his memorandum was the examining physician's memorandum of April 5, 1972. Dr. Pease also stated (HT, p. 36) that the policy of the Health Service is that all official business comes out "over his signature." Accordingly, we find that Dr. Pease properly sent the medical report to the personnel division.

Federal Personnel Manual Supplement (FPM SUPPL.) 752-1 contains the Commission's principles, interpretations, and policies pertaining to the adverse action regulations. FPM Suppl. 752-1, Subchapter S1-3, which is concerned

with the adverse action of removal, states in pertinent part:

> (5) (c) The agency has authority to direct an employee to take a fitness-for-duty examination. This authority is clearly *implied* by the language of section 01.3 of Executive Order 9830. Section 01.3 provides that "the head of each agency shall remove, demote, or reassign to another position any employee in the competitive service whose conduct or capacity is such that his removal, demotion, or reassignment will promote the efficiency of the service." The word capacity includes physical and mental capacity. The authority to require a fitness-for-duty examination is also *implied* in those sections of title 5, United States Code, which require that a person being removed from the competitive service be given reasons for the removal and in that section which authorized agencies to apply for the retirement of employees on disability. To comply with the requirements of the Executive Order and law, an agency that has a question about the physical or mental capacity of an employee should have a medical report from a physician who has examined the employee.
>
> (d) If the employee refuses to submit to a medical examination he may be removed for refusing.

After the recommendation by Dr. Pease that a psychiatric evaluation be made of the appellant, the record is undisputed that the appellant neither reported for the scheduled examination of April 25, 1972 at the Civilian

Health Service; nor submitted the names of Board-certified psychiatrists to whom she would report for an evaluation; nor did the appellant respond to later requests for the names of Board-certified psychiatrists from whom she would be willing to have an evaluation made.

From our analysis of all the evidence of record we find that the appellant did fail to undergo a psychiatric evaluation as part of a fitness-for-duty examination. We find the reason given by the agency for proposing the appellant's removal is, therefore, sustained by the preponderance of the evidence of record. We find further that the sustained reason refers to a sufficiently serious matter to warrant the agency's initiating adverse action against the appellant and proposing her removal, and that the agency's action in removing her on the sustained charge was not arbitrary, unreasonable, or capricious, but was for such cause as will promote the efficiency of the service.

RECOMMENDATION

We recommend that no change be made in the personnel action of the Office of the Director of Defense Program Analysis and Evaluation, in effecting Mrs. Pryor's removal on October 12, 1973.

Unless this decision is further appealed within 15 calendar days of the day on which it is received, it becomes the final decision of the U. S. Civil Service Comission. Any further appeal of this decision must be sent directly to:

Board of Appeals and Review
U.S. Civil Service Commission
Washington, D.C. 20415

Two copies of the letter of further appeal and all representation which the Board should consider beyond those now in the appeal file must be submitted within the 15 calendar day time limitation.

Attached is CSC Form 942 providing more detailed information about further appeals to the Civil Service Commission's Board of Appeals and Review.

/s/ Herman D. Staiman, Chief
Herman D. Staiman, Chief
Appeals Examining Office

APPENDIX F

[March 8, 1972]

(Administration)

Mrs. Helen A. Pryor
3025 Ontario Road, N. W. No. 409
Washington, D. C. 20009

Dear Mrs. Pryor:

It is the responsibility of every agency to insure that employees possess the medical capabilities essential to efficient performance of their work. This responsibility is particularly critical when employees encounter medical problems. In view of the difficulties that you have had, particularly in recent weeks, we believe that it is necessary for us to have the benefit of current medical advice to determine your physical and mental capabilities for efficient performance of your duties. Accordingly, you are requested to report to the Civilian Employees Health Service at 8:00 a.m., March 14, 1972, Room 1E 356, the Pentagon, for a fitness-for-duty examination. Our medical officer has advised that to prepare for this examination you should come fasting: nothing to eat or drink after 12 o'clock the midnight before. This examination will include both a physical examination and psychiatric evaluation.

If, however, you prefer not to be examined by Federal Medical Officers, these examinations may be conducted by two physicians of your choice subject to the following conditions: (1) the physicians you select must be board-certified in the appropriate medical specialties; (2) one must be an Internist and the other a Psychiatrist;

(3) the physicians you select must be acceptable to the Office of the Secretary of Defense; and (4) the physicians must submit a complete report of examination directly to me. OSD will pay the physicians direct for the examinations. If you prefer this alternative, you should select an and submit the name of a board-certified Internist and 3 to 5 names of board-certified Psychiatrists to whom you are willing to report for examination. From your list of board-certified Psychiatrists, I will select a medical examiner and arrange the examinations.

The Civil Service regulations require that, when a medical examination of this type is ordered, the appointment of a representative for the employee is required. Accordingly, you are asked to name a representative to assist you in representing your interests. You may select a family member, union officer, veteran's service officer, another employee, or anyone else of your own choosing. If you do not name a representative, the Civil Service regulations require that the Office of the Secretary of Defense appoint a representative for you. This would be done by me.

If you prefer not to be examined by Federal Medical Officers, you must comply with the above instructions. Your request to follow this procedure and your representative's name and address must be received by the close of business March 13, 1972. Please submit your list of medical officers and representative's name and address to my attention at the following address:

Office of the Secretary of Defense
Personnel Division, Room 3B 321
The Pentagon
Washington, D. C. 20301

If you have any questions about the Civil Service regulations, examination arrangements, or any other aspects of this matter, it is suggested that you (or your representative) contact Mr. Robert White of the Personnel Division, OX7-5171.

Sincerely,

[SIGNED]

G. F. Brennan
Director of Personnel

APPENDIX G

[April 10, 1972]

(Administration)

Mrs. Helen A. Pryor
3025 Ontario Road, N.W.
Apt. No. 409
Washington, D. C. 20009

Dear Mrs. Pryor:

Based on the physical examination you were given in the Civilian Employees' Health Service on 16 March 1972, the Federal Medical Officer disclsoed the possibility that there may be emotional factors involved which should be evaluated by a psychiatrist. He recommended that you be evaluated by a psychiatrist for a final determination of your fitness for duty.

In view of the recommendation by the Medical Officer, you are requested to report to the Civilian Employees' Health Service at 8 A. M., 25 April 1972, Room 1E-356, the Pentagon, for a psychiatric evaluation.

If, however, you prefer not to be examined by a Federal Medical Officer, the examination may be conducted by a physician of your choice, subject to the following: (1) You should select and submit three to five names of board-certified psychiatrists, to whom you are willing to report for examination. From your list of board-certified psychiatrists, I will select a medical examiner and arrange for the examination. The physician must submit a complete report of the examination to me. OSD will pay the physician direct for the examination.

The Civil Service regulations require that, when a medical examination of this type is ordered, the appointment of a representative for the employee is required. Accordingly, you are asked to name a representative to assist you in representing your interests. You may select a family member, union officer, veteran's service officer, another employee, or anyone else of your own choosing. If you do not name a representative, the Civil Service regulations require that the Office of the Secretary of Defense appoint a representative for you. This would be done by me.

If you prefer not to be examined by a Federal Medical Officer, you must comply with the above instructions. Your request to follow this procedure and your representative's name and address must be received by the close of business, 19 April 1972. Please submit your list of board-certified psychiatrists and representative's name and address to my attention at the following address:

Office of the Secretary of Defense
Personnel Division
Room 3B-321, The Pentagon
Washington, D. C. 20301

If you have any questions about the Civil Service regulations, examination arrangements, or any other aspect of this matter, it is suggested that you (or your representative) contact Miss Lois Brissey of the Personnel Division, telephone OX-50511.

Sincerely,

[SIGNED]

G. F. Brennan
Director of Personnel

APPENDIX H

[June 1, 1972

(Administration)

Mrs. Helen A. Pryor
3025 Ontario Road, N. W. No. 405
Washington, D. C. 20009

Dear Mrs. Pryor:

Reference is made to our letter, dated April 10, 1972, advising you to report for a psychiatric evaluation. Dr. John Ewan, your private physician, has informed me of your selection of a board-certified psychiatrist, Dr. Robert Groh. You are further advised that I will be arranging an appointment for you in furtherance of your physical fitness examination. As soon as a date has been scheduled, you will be notified when to report to Dr. Groh for the examination.

The Office of the Secretary of Defense will reimburse Dr. Groh for any expenses incurred in connection with his examination directly. Dr. Groh will be requested to provide a copy of his evaluation to Dr. Phillip P. Pease, Chief, Medical Unit, Civilian Employees' Health Service. In accordance with your telephone conversation of 21 April 1972 with Mr. Earl L. Wayne designating Mr. Edward C. Bou as your representative, a copy of this letter has been sent to Mr. Bou.

It is requested that you reply to me in writing by the close of business, June 6, 1972, regarding your cooperation in the above matter. A stamp self-addressed envelope is enclosed for your convenience.

If you have any questions regarding any aspects of this matter, it is suggested that you or your representative contact Mr. Robert White of the Personnel Division, telephone OX7-5171.

Sincerely,

[SIGNED]

G. F. Brennan
Director of Personnel

cc: Mr. Edward C. Bou

APPENDIX I

[July 17, 1973]

OFFICE OF THE DIRECTOR OF
DEFENSE PROGRAM ANLYSIS AND EVALUATION
WASHINGTON, D. C. 20301

(Resource Analysis)

MEMORANDUM FOR Mrs. Helen A. Pryor

SUBJECT: Notice of Proposed Removal

This is notice that I propose to remove you from your position of Secretary (Stenography), GS-318-8. Office of the Director of Defense Program Analysis and Evaluation (ODDPA&E), no earlier than 31 calendar days from the date you receive this notice. The reason for this proposed action is insubordination based on your refusal to submit to a psychiatric evaluation as part of a fitness-for-duty examination, as follows:

a. After extensive absences from 24 January 1972 – 23 February 1972, your personal and phone contacts with me and other members of the ODDPA&E staff, as well as your general behavior, indicated that you may not be able to effectively perform the duties of your position. On 8 March 1972, therefore, you were requested, by letter, to report for a medical examination on 14 March 1972 to include both a physical exam and a psychiatric evaluation, in order to determine your fitness-for-duty. You were instructed to submit your list of medical specialists no later than 13 March 1972 if you preferred not to be examined by Federal Medical Officers. No list of

medical specialists was received. You reported for the physical exam but did not submit to a board-certified psychiatric evaluation at that time. The examining physician's report to the Director of Personnel, dated 6 April 1972, recommended that a psychiatric evaluation be performed before any final determination be made as to your fitness-for-duty.

b. By letter on 10 April 1972, you were requested to report for a psychiatric examination either at the Civilian Employee's Health service on 25 April 1972 or by a board-certified private psychiatrist chosen from a list of 3 to 5 names of your choice. You failed to report for this 25 April exam, and also failed to submit a list of private psychiatrists to whom you were willing to report for examination.

c. Although Dr. John Ewan, your private physician informed Mr. Robert White in the OSD Personnel Division on 17 May 1972 that you had indicated that you might agree to examination by Dr. Robert Groh, a board-certified psychiatrist; you failed to respond to a letter from the Director of Personnel dated 1 June 1972 in which he requested your cooperation in this matter and a written reply by 6 June 1972 regarding your willingness to report for such examination. No reply was received.

d. In addition, in connection with an Agency initiated application for disability retirement filed in your behalf on 10 August 1972 you failed to cooperate with a Civil Service Commission medical officer who attempted to obtain further medical evidence by scheduling a physical examination as stated in Civil Service Commission letter dated 24 November 1972, addressed to: Commanding Officer, Finance and Accounts Office USA.

(1) In early September 1972 you were sent a list of three board-certified psychiatrists by the Civil Service Commission from which to select, so that a medical examination could be scheduled. A reply was requested by 11 September 1972.

(2) On 20 September 1972 you requested that the Civil Service Commission grant an extension of time for replying, from 11 September until 20 October 1972. This request was granted by the Civil Service Commission on 29 September 1972.

(3) No reply was received from you by the Civil Service Commission on 20 October.

(4) On 24 October you telephoned the Civil Service Commission to say you were not ready to respond.

(5) Although you presented the Commission with an 18 page letter on 27 October 1972, you still did not select a board-certified psychiatrist to whom you would report. On 2 November you were informed by the Civil Service Commission that no further extension could be granted and you were again requested to respond to the earlier letters and to select the name of a physician from the list of three board-certified psychiatrists forwarded in September. The Civil Service Commission received no response in regard to this request.

(6) In view of your failure to cooperate with a Commission medical officer's attempt to obtain further medical evidence (as described above) the Civil Service Commission, on 24 November 1972, dismissed the agency filed disability retirement claim because of lack of sufficient medical evidence.

You have the right to reply to these charges personally, or in writing or both personally and in writing. Your re-

ply, or replies, if any, are to be made to me and may be supported by affidavits and such other pertinent evidence you may wish to submit. You may review the material on which the agency is relying to support the reasons for your proposed removal. If you wish to see this material, please call Mr. Robert White, Personnel Management Specialist, in the OSD Personnel Division on extension 78305. Mr. White is located in Room 3B-347, The Pentagon. You may use not more than sixteen (16) hours duty time for the review of the record and preparation of your reply. You should make mutually agreeable arrangements with the undersigned, for scheduling the use of the duty time for these purposes. Your written and/or personal replies, if any, must be received by me not later than 10 calendar days from the date you receive this notice. Consideration will be given to extending this period if you submit a request stating your reasons for desiring more time. This request must be in writing.

This is a notice of proposed action. No decision has been made to remove or otherwise discipline you. Such a decision will not be made until after your reply or replies and such affidavits and evidence you may submit have been received and considered, or as soon as practical after the expiration of the 10 day limit if no reply is received. You should continue to come to work as usual or request such leave as you may wish to take.

If you have any questions concerning this notice or Civil Service or OSD regulations governing such actions, you should contact Mr. White. He will show you the regulations and provide any related advice and assistance you may request.

/s/ Donald W. Srull
Donald W. Srull
Deputy Director (Resource Analysis)

APPENDIX J

[October 4, 1973]

OFFICE OF THE DIRECTOR OF
DEFENSE PROGRAM ANALYSIS AND EVALUATION
WASHINGTON, D. C. 20301

MEMORANDUM FOR MRS. HELEN A. PRYOR

SUBJECT: Decision to Remove

This refers to my memorandum dated 17 July 1973, notifying you of proposal to remove you from employment as Secretary (Stenography), GS-318-8, Office of the Director of Defense Program Analysis and Evaluation. You were advised in that memorandum that a reply was due ten days after receipt and that a written request for additional time, if submitted within this ten day period, would be considered.

To provide you with every reasonable opportunity to consider fully and reply to my memorandum, I have given you a series of extensions to the due date for your reply. The last and final extension was to close of business September 26, 1973, as stated in memorandum to you dated 25 September 1973. I have given careful consideration to the contents of your other memorandums. The information you requested in your memorandum of September 26, 1973 is not relevant to the proposed removal.

You have been provided with all the information and material relevant to the proposal for your removal. You have been provided all other information and material which you have requested which it is permissible and pos-

sible to furnish you. You have been furnished full and relevant information concerning the proposal and the basis for it to enable you to reply fully.

I have given careful consideration to all of the facts bearing upon my proposal, including your memorandums of reply dated July 27, 1973, August 16, 1973, August 21, 1973, August 29, 1973, September 5, 1973, September 7, 1973, September 17, 1973, and September 26, 1973. I have concluded that all the reasons set forth in memorandum of 17 July 1973 are fully supported by the evidence and are sustained. I also find these reasons warrant your removal to promote the efficiency of the service. You are notified that your removal for insubordination based on your refusal to submit to a psychiatric evaluation as part of a fitness-for-duty examination will be effective close of business 12 October 1973.

You have a right to appeal this action to the Director of Defense Program Analysis and Evaluation or to the Chief, Appeals Examining Office, U. S. Civil Service Commission, 1900 E Street, N. W., Washington, D. C. 20415. If you appeal first to the Civil Service Commission, you forfeit your right to appeal to the Director of Defense Program Analysis and Evaluation. If you appeal first to the Director of Defense Program Analysis and Evaluation within the prescribed time limit, you may appeal to the Civil Service Commission only after you receive notice of the decision of the Director of Defense Program Analysis and Evaluation, unless he fails to make a decision within 60 days after the date you filed your appeal. If the Director of Defense Program Analysis and Evaluation fails to make his decision within that sixty days, you may elect to terminate your appeal to him by appealing to the Civil Service Commission.

If you elect to appeal first to the Civil Service Commission, your appeal must (a) be in writing, (b) give your reasons for contesting your removal, with such offer of proof and pertinent documents as you are able to submit, and (c) be filed not later than 15 calendar days after the effective date of your separation.

If you elect first to appeal to the Director of Defense Program Analysis and Evaluation, your appeal must be in writing and be received not later than 15 days after the effective date of your separation. It must include:

a. Your name, position title and grade, and organization.

b. The specific action you are appealing.

c. The basis for the appeal.

d. The name of your representative, if any.

e. Whether you want a hearing and, if you do, a list of the witnesses you want to appear at such a hearing.

f. Whether your appeal is based, in whole or in part, on discrimination because of sex, race, color, religion, or national origin.

Your appeal should be submitted to the Director of Defense Program Analysis and Evaluation, through the Director of Personnel, to the following address:

Office of the Secretary of Defense
Directorate for Personnel
Room 3B-321, The Pentagon
Washington, D. C. 20301

You have a right to be accompanied, represented, and advised by a representative of your own choosing. You are authorized to use not more than 24 hours of official duty time between now and the effective date of your separation to prepare your appeal. If your representative is an employee of the Office of the Secretary of Defense or activity assigned to the Office of the Secretary of Defense for administrative support, who could otherwise be in a duty and pay status, he may use not more than 24 hours of official duty time for preparation of the appeal and he will be considered officially on duty without charge to leave for the time required to present your appeal to the Director of Defense Program Analysis and Evaluation.

If you have any questions concerning this notice or the Civil Service and OSD regulations governing such actions, you should contact Mr. Robert White, Personnel Management Specialist, CX-78305, Room 3B-347, the Pentagon. He will show you the regulations and provide any related advice and assistance you may request. During the duration of this notice period, you will be continued in a duty status unless you request annual or sick leave.

/s/ Donald W. Srull
Deputy Director
(Resource Analysis)

Receipt Acknowledged: Helen A. Pryor
8:45 a.m.
October 5, 1973

APPENDIX K

UNITED STATES CONSTITUTION

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX L

UNITED STATES CODE ANNOTATED

5 U.S.C.A. § 7501

5 U.S.C.A. § 7511

5 U.S.C.A. § 7512

5 U.S.C.A. § 7701

CHAPTER 75 – ADVERSE ACTIONS

SUBCHAPTER I – COMPETITIVE SERVICE

Sec.
7501. Cause; procedure; exception.

SUBCHAPTER II – PREFERENCE ELIGIBLES

7511. Definitions.
7512. Cause; procedure; exception.

* * *

SUBCHAPTER I – COMPETITIVE SERVICE

§ 7501.

(a) An individual in the competitive service may be removed or suspended without pay only for such cause as will promote the efficiency of the service.

(b) An individual in the competitive service whose moval or suspension without pay is sought is entitled to reasons in writing and to –

(1) notice of the action sought and of any charges preferred against him;

(2) a copy of the charges;

(3) a reasonable time for filing a written answer to the charges, with affidavits; and

(4) a written decision on the answer at the earliest practicable date.

Examination of witnesses, trial, or hearing is not required but may be provided in the discretion of the individual directing the removal or suspension without pay. Copies of the charges, the notice of hearing, the answer, the reasons for and the order of removal or suspension without pay, and also the reasons for reduction in grade or pay, shall be made a part of the records of the employing agency, and, on request, shall be furhished to the individual affected and to the Civil Service Commission.

(c) This section applies to a preference eligible employee as defined by section 7511 of this title only if he so elects. This section does not apply to the suspension or removal of an employee under section 7532 of this title. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 527.

* * *

SUBCHAPTER II – PREFERENCE ELIGIBLES

§ 7511. Definitions.

For the purpose of this subchapter –

(1) "preference eligible employee" means a permanent or indefinite preference eligible who has completed a probationary or trial period as an employee of an Executive agency or as an individual employed by the government of the District of Columbia, but does not include an employee whose appointment is re-

quired by Congress to be confirmed by, or made with the advice and consent of, the Senate, except an employee whose appointment is made under section 3311 of title 39; and

(2) "adverse action" means a removal, suspension for more than 30 days, furlough without pay, or a reduction in rank or pay.

Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 528.

* * *

§ 7512. Cause; procedure; exception

(a) An agency may take adverse action against a preference eligible employee, or debar him for future appointment, only for such cause as will promote the efficiency of the service.

(b) A preference eligible employee against whom adverse action is proposed is entitled to –

(1) at least 30 days' advance written notice, except when there is reasonable cause to believe him guilty of a crime for which a sentence of imprisonment can be imposed, stating any and all reasons, specifically and in detail, for the proposed action;

(2) a reasonable time for answering the notice personally and in writing and for furnishing affidavits in support of the answer; and

(3) a notice of an adverse decision.

(c) This section does not apply to the suspension or removal of a preference eligible employee under section 7532 of this title. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 528.

APPENDIX M

EXECUTIVE ORDER 9830

AMENDING THE CIVIL SERVICE RULES AND PROVIDING FOR FEDERAL PERSONNEL ADMINISTRATION

By virtue of the authority vested in me by the Constitution, by section 1753 of the Revised Statutes (5 U. S. C. 631), by the Civil Service Act of January 16, 1883 (22 Stat. 403), and as President of the United States, it is hereby ordered as follows, effective May 1, 1947:

PART I – ORGANIZATION FOR PERSONNEL ADMINISTRATION

Organization for personnel administration in the executive branch of the Federal Government is hereby prescribed as follows:

Sec. 01.1 Responsibility for personnel management. Personnel management is a primary responsibility of all who plan, direct, or supervise the work of Federal employees. Personnel management methods should be consistent for the Government as a single employer and yet be sufficiently flexible to meet the diversified conditions in the Federal service.

Sec. 01.2 Civil Service Commission responsibilities under this order. (a) The Commission shall be responsible to the President for the proper appliation of the Civil Service Act and Rules, the Veterans' Preference Act, and all other applicable statutes and Executive orders imposing responsibilities on the Commission.

(b) The Commission shall exercise and provide leadership in personnel matters throughout the Federal service, and in the discharge of this responsibility shall, whenever practicable, consult Federal agencies.

(c) The Commission shall develop and promulgate standards, applicable to the competitive service and designed to protect and promote its efficiency, for the reinstatement or reemployment of former Federal employees, and for the promotion, demotion, reassignment, and transfer of present employees. The Commission shall also determine the applicability, in general and in specific cases, of the reemployment provisions of (1) section 8 of the Selective Training and Service Act of 1940 (54 Stat. 890) as amended (50 U. S. C. App. 308), to persons who left the Federal service to serve in the armed forces of the United States, and (2) section 2 of the act of June 23, 1943, 57 Stat. 162, as amended (50 U. S. C. App. 1472), to persons who left the Federal service to serve in the merchant marine; and the Commission may issue such regulations or instructions as it may deem necessary or appropriate for carrying out the said reemployment provisions.[1]

(d) The Commission shall prescribe procedures to be followed by agencies in connection with removals, demotions, and suspensions in the competitive service which will insure equitable and uniform treatment to employees against whom adverse action is proposed.

(e) The Commission shall, when consistent with law and with the economical and efficient administration of the Government, delegate to the agencies its authority to act in personnel matters in accordance with standards issued by the Commission.

(f) The Commission shall maintain an adequate system of inspection to determine that equitable and sound application of statutes, Executive orders, regulations and

---

[1] As amended May 21, 1948.

standards relating to personnel management is being carried out by the agencies. Whenever the inspection indicates failure on the part of an agency to adhere to established policies, regulations and standards, the Commission shall take such action as may be appropriate to bring about adherence thereto. In this connection, the Commission may suspend or revoke any delegation of its authority.

(g) The Commission shall in the exercise of its personnel functions give all practicable assistance to international organizations in which the United States participates, to the Puerto Rico civil service board, and to such Federal, Territorial, State, or local agencies as shall request its cooperation and offer like cooperation, including, when appropriate, the sharing of any necessary expenses. Under such regulations as may be jointly agreed upon, the Commission shall conduct or join with such agencies in conducting examinations or other personnel functions. In its discretion, the Commission may certify eligibles from appropriate registers maintained by the Puerto Rico civil service boards of State and local agencies, if such boards agree, and the Commission finds that the requirements of law concerning appointments to the competitive service have been met. If such boards so desire, they may, upon agreement with the Commission, certify eligibles from appropriate registers maintained by the Commission.

Sec. 01.3 Agency responsibilities for personnel management. (a) The head of each agency, in accordance with applicable statutes, Executive orders, and rules, shall be responsible for personnel management in his agency. To assist and advise him in carrying out this responsibility, he shall maintain or establish such office or division of personnel as may be required. He shall designate a director of personnel or other similarly responsible offi-

cial to be in charge of such office or division. Such director or other official shall represent the head of the agency in personnel matters, subject to his instructions.

(b) The head of each agency shall provide for the cooperation of his agency with the Civil Service Commission in the conduct of personnel matters.

(c) Authority for the conduct of personnel matters within each agency should be delegated to the extent compatible with provisions of law and with economical and efficient administration to those officials responsible for planning, directing, and supervising the work of others. The exercise of such delegated authority shall be subject to policies, rules, regulations and standards established by the head of the agency, and shall be subject to appropriate review and inspection.

(d) The head of each agency shall remove, demote, or reassign to another position any employee in the competitive service whose conduct or capacity is such that his removal, demotion, or reassignment will promote the efficiency of the service.

Sec. 01.4 Committees of expert examiners and boards of examiners. (a) In order to promote the effective recruitment and placement of persons for the Federal service, the departmental and field service resources of the Federal agencies may be utilized to the extent permitted by law. After consulting the agency or agencies concerned, the Commission may establish in the departmental service committees of examiners, expert in their respective fields, for scientific, professional, or technical positions, and in the field service, boards of examiners for any position. If such a position is peculiar to an agency, the committee or board shall be composed of not less than three qualified officers or employees of the agency concerned. If such a

position exists in more than one agency, the committee or board shall be composed of not less than three qualified officers or employees of the agencies concerned.

(b) The work of the committees or boards referred to in this section shall be under the direction and supervision of the Commission in connection with the execution of the Civil Service Act, Rules, and Regulations.

(c) The duties performed by the members of such committees or boards shall be considered part of their official duties and adequate time shall be allowed for their performance by the agency in which they are employed.

(d) Where qualified examiners are not readily available in the Federal service, and to the extent permitted by law, the Commission or the agency concerned may designate and compensate individuals outside the service especially qualified by experience and training to serve as examiners.

Sec. 01.5 Federal Personnel Council. (a) The Council of Personnel Administration shall hereafter be known as the Federal Personnel Council and shall be continued within the Civil Service Commission.

(b) The membership of the Council shall consist of a chairman, the director of personnel or official responsible for personnel matters in each agency subject to the Civil Service Rules, one additional member designated by the Director of the Bureau of the Budget, and such additional member or members as the Commission shall designate.

(c) The Chairman of the Council shall be appointed by the Civil Service Commission after consultation with the Council and shall serve as a member of the staff of the Commission.

(d) The purpose of the Council, functioning as an advisory body, shall be to promote through study and dis-

cussion the application, interpretation, and development of personnel policies and practices. Its findings and recommendations shall be submitted to the Commission and may be submitted to the President or to other Federal agencies.

(e) Where there are substantial concentrations of Federal agencies in a geographical area, subsidiary councils may be established and maintained as recommended by the Council and approved by the Commission. The membership of such councils shall consist of the heads of field establishments in such areas or their designated representatives and of the designated representatives of the Commission.

PART II – CIVIL SERVICE RULES

Note: Revoked by Executive Order 10577.

PART III

Note: Revoked certain Executive orders.

HARRY S. TRUMAN

THE WHITE HOUSE
February 24, 1947.

APPENDIX N

CODE OF FEDERAL REGULATIONS
– Revised as of January 1, 1973

752 – Adverse Actions by Agencies

772 – Appeals to the Commission

Title 5 – Administrative Personnel

Chapter 1 – Civil Service Commission

PART 752 – ADVERSE ACTIONS BY AGENCIES

Subpart A – General Provisions

Sec.

752.101 Applicability.
752.102 Definitions.
752.103 General exclusions.
752.104 General standards.
752.105 Agency records.

Subpart B – Removal, Suspension for More Than 30 Days, Furlough Without Pay, and Reduction in Rank or Pay

752.201 Coverage.
752.202 Procedures.
752.203 Right of appeal to the Commission.
752.204 Time limit for initial appeal.
752.205 Restrictions on use of appeal rights.

Authority: The provisions of this Part 752 issued under 5 U.S.C. 1302, 3301, 3302, 7701, E.O. 10577; 3 CFR 1954-1958 Comp., p. 218, E.O. 11491; 3 CFR, 1969 Comp.

Subpart A – General Provisions

§ 752.101 Applicability.

This part applies to removals, suspensions, furloughs without pay, and reduction in rank or pay of employees of the Government of the United States and the government of the District of Columbia.

[33 F.R. 12491, Sept. 4, 1968, as amended at 34 F.R. 2479, Feb. 21, 1969]

* * *

§ 752.104 General standards.

(a) An agency may not take an adverse action against an employee covered by this part except for such cause as will promote the efficiency of the service. Among the reasons that constitute "such cause as will promote the efficiency of the service" for this purpose are the reasons for disqualification of an applicant listed in § 731.201(b)-(g) of this title. These reasons may be based on preappointment factors as well as on postappointment factors.

* * *

(c) An agency may not take an adverse action against an employee covered by this part that is based on discrimination because of race, color, religion, sex, or national origin, or for physical handicap with respect to any position the duties of which may be efficiently performed by a person with the physical handicap.

[33 F.R. 12491, Sept. 4, 1968, as amended at 34 F.R. 5372, Mar. 19, 1969]

§ 752.105 Agency records.

Each agency shall make a part of its records, copies of the notice of proposed adverse action, the material re-

lied on by the agency to support the reasons in that notice, any answer made by the employee, the notice of any agency hearing on the proposed adverse action and the report thereof, and the notice of decision.

[35 F.R. 14918, Sept. 25, 1970]

Subpart B – Removal, Suspension for More Than 30 Days, Furlough Without Pay, and Reduction in Rank or Pay[1]

§ 752.201 Coverage.

(a) *Employees covered.* This subpart applies to:

(1)(i) Any career, career-conditional, overseas limited, indefinite, or term employee, or any employee serving under a career executive assignment, in a competitive position who is not serving a probationary or trial period and (ii) any employee serving in a competitive position who has completed 1 year of current continuous employment except one serving under a temporary appointment with a definite time limitation or a limited executive assignment;

* * *

(3) Any preference eligible employee who has completed 1 year of current continuous employment in a position outside the competitive service.

(b) *Adverse actions covered.* This subpart applies to:

(1) Removal;

(2) Suspension for more than 30 days;

(3) Furlough without pay; and

* * *

---

[1] 34 F.R. 2479, Feb. 21, 1969.

(c) *Exclusions.* This subpart does not apply to an employee or adverse action excluded by § 752.103.

[33 F.R. 12491, Sept. 4, 1968, as amended at 34 F.R. 2479, Feb. 21, 1969; 35 F.R. 3217, Feb. 20, 1970]

§ 752.202 Procedures.

(a) *Notice of proposed adverse action.* (1) Except as provided in paragraph (c) of this section, an employee against whom adverse action is sought is entitled to at least 30 full days' advance written notice stating any and all reasons, specifically and in detail, for the proposed action.

(2) Subject to the provisions of subparagraph (3) of this paragraph, the material on which the notice is based and which is relied on to support the reasons in that notice, including statements of witnesses, documents, and investigative reports or extracts therefrom, shall be assembled and made available to the employee for his review. The notice shall inform the employee where he may review that material.

(3) Material which cannot be disclosed to the employee, or to his designated physician under § 294.401 of this chapter, may not be used by an agency to support the reasons in the notice.

(b) *Employee's answer.* Except as provided in paragraph (c) of this section, an employee is entitled to a reasonable time for answering a notice of proposed adverse action and for furnishing affidavits in support of his answer. The time to be allowed depends on the facts and circumstances of the case, and shall be sufficient to afford the employee ample opportunity to review the material relied on by the agency to support the reasons in the notice and to prepare an answer and secure affidavits.

The agency shall provide the employee a reasonable amount of official time for these purposes if he is otherwise in an active duty status. If the employee answers, the agency shall consider his answer in reaching its decision. The employee is entitled to answer personally, or in writing, or both personally and in writing. The right to answer personally includes the right to answer orally in person by being given a reasonable opportunity to make any representations which the employee believes might sway the final decision on his case, but does not include the right to a trial or formal hearing with examination of witnesses. When the employee requests an opportunity to answer personally, the agency shall make a representative or representatives available to hear his answer. The representative or representatives designated to hear the answer shall be persons who have authority either to make a final decision on the proposed adverse action or to recommend what final decision should be made.

* * *

(d) *Duty status during notice period.* Except as provided in paragraph (e) of this section, an employee against whom adverse action is proposed is entitled to be retained in an active duty status during the notice period. When circumstances are such that the retention of the employee in an active duty status in his position may result in damage to Government property or may be detrimental to the interests of the Government or injurious to the employee, his fellow workers, or the general public, the agency may temporarily assign him to duties in which these conditions will not exist or place him on leave with his consent.

(e) *Suspensions during notice period.* In an emergency case when, because of the circumstances described in paragraph (d) of this section, an employee cannot be kept in an active duty status during the notice period, the agency

may suspend him. This suspension is a separate adverse action. An employee whose suspension under this paragraph is proposed is entitled, in connection with the suspension, to the following:

(1) If the suspension is for more than 30 days, to the procedures required by this subpart;

(2) If the suspension is for 30 days or less and the employee is covered under § 752.301, to the procedures required by Subpart C of this part; or

(3) If the suspension is for 30 days or less and the employee is in the excepted service and not covered by § 752.301, to a written notice at least 24 hours in advance of the effective date of the suspension. The agency shall include in the notice of suspension the reasons for not retaining the employee in an active duty status during the notice period. If the employee appeals from the final adverse decision, the Commission reviews the reasons for not retaining him in an active duty status to determine their consonance with the circumstances described in paragraph (d) of this section. The agency may place the employee in a nonduty status with pay for such time, not to exceed 5 days, as is necessary to effect the suspension.

(f) *Notice of adverse decision.* The employee is entitled to notice of the agency's decision at the earliest practicable date. The agency shall deliver the notice of decision to the employee at or before the time the action will be made effective. The notice shall be in writing, be dated, and inform the employee:

(1) Which of the reasons in the notice of proposed adverse action have been found sustained and which have been found not sustained;

(2) Of his right of appeal to the appropriate office of the Commission;

(3) Of any right of appeal to the agency under Subpart B of Part 771 of this chapter, including the person with whom, or the office with which, such an appeal shall be filed;

(4) Of the time limit for appealing as provided in § 752.204;

(5) Of the restrictions on the use of appeal rights as provided in § 752.205; and

(6) Where he may obtain information on how to pursue an appeal.

[33 F.R. 12491, Sept. 4, 1968, as amended at 35 F.R. 14918, Sept. 25, 1970]

§ 752.203. Right of appeal to the Commission.

An employee is entitled to appeal to the Commission from an adverse action covered by this subpart. The appeal shall be in writing and shall set forth the employee's reasons for contesting the adverse action, with such offer of proof and pertinent documents as he is able to submit.

[35 F.R. 14918, Sept. 25, 1070]

§ 752.204 Time limit for initial appeal.

(a) Except as provided in paragraph (b) of this section and § 752.205, an employee may submit an appeal at any time after receipt of the notice of adverse decision but not later than 15 days after the adverse action has been effected.

(b) The Commission or the agency, as appropriate, may extend the time limit on appeal to it when the appellant shows that he was not notified of the time limit and was not otherwise aware of it, or that he was prevented by circumstances beyond his control from appealing within the time limit.

[36 F.R. 25097, Dec. 29, 1971]

§ 752.205 Restrictions on use of appeal rights.

(a) An appeal to the agency and an appeal to the Commission from the same original decision may not be processed concurrently.

(b) An employee who appeals first to the Commission within the prescribed time limit forfeits his right of appeal to the agency.

(c) An employee who appeals first to the agency within the prescribed time limit may appeal to the Commission only after receipt of an agency appellate decision, except that if no agency appellate decision has been made within 60 days from the date of filing the appeal to the agency, the employee may elect to terminate that appeal by appealing to the Commission.

[35 F.R. 14918, Sept. 25, 1970]

• • •

---

code of federal regulations

5

Administrative Personnel

Revised as of January 1, 1975

6

(Reserved)

CONTAINING
A CODIFICATION OF DOCUMENTS
OF GENERAL APPLICABILITY
AND FUTURE EFFECT

AS OF JANUARY 1, 1975

With Ancillaries

Published by
the Office of the Federal Register
National Archives and Records Service
General Services Administration

as a Special Edition of
the Federal Register

Title 5 – Administrative Personnel

Chapter 1 – Civil Service Commission

PART 752 – ADVERSE ACTIONS BY AGENCIES

§ 752.202 Procedures.

(f) *Notice of adverse decision.* The employee is entitled to notice of the agency's decision at the earliest practicable date. The decision shall be made by a higher level official of the agency, when that exists, than the office who proposed the adverse action. The agency shall deliver the notice of decision to the employee at or before the time the action will be made effective. The notice shall be in writing, be dated, and inform the employee:

PART 772 – APPEALS TO THE COMMISSION

Subpart A – [Reserved]

Subpart B – [Reserved]

Subpart C – Commission's Appellate Review of Actions Against Employees

Sec.

772.301 Coverage.
772.302 Failure to prosecute.
772.303 Death of appellant.
772.304 Evidence.
772.305 Hearings.
772.306 Decision on initial appeal.
772.307 Further appeal to the Board of Appeals and Review.
772.308 Review by the Commission.

* * *

Authority: The provisions of this Part 772 issued under 5 U.S.C. secs. 1302, 3301, 3302, 5115, 5338, 7512, 7701, 8347, E.O. 10577; 3 CFR, 1954-1958 Comp., p. 218, E.O. 11491; 3 CFR, 1969 Comp. secs. 772.401-772.404 also issued under 5 U.S.C. secs. 7151, 7154, E.O. 11478; 3 CFR, 1969 Comp.

Source: The provisions of this Part 772 appear at 33 F.R. 12497, Sept. 4, 1968, unless otherwise noted.

* * *

Subpart C – Commission's Appellate Review of Actions Against Employees

§ 772.301 Coverage.

(a) *Agency-initiated actions.* Except as otherwise provided, this subpart applies to appeals to the Commission

under Subpart H of Part 315 of this chapter, Subpart B of Part 330 of this chapter, Subpart I of Part 351 of this chapter, Subpart E of Part 531 of this chapter, and Subparts B and C of Part 752 of this chapter.

(b) *Commission-initiated actions.* Except as otherwise provided, this subpart applies to appeals to the Commission from adverse actions effected under Part 754 of this chapter, and from decisions of the Bureau of Retirement and Insurance on applications for disability retirement effected under Part 831 of this chapter. In appeals, under Part 754 of this chapter, the Commission's Bureau of Personnel Investigations is deemed the "agency" as that term is used in this subpart.

§ 772.302 Failure to prosecute.

The Commission shall close an appeal for failure to prosecute if an appellant does not furnish required information and duly proceed with the advancement of his appeal. However, instead of closing for failure to prosecute, the Commission may adjudicate the appeal if sufficient information for that purpose is available. The Commission may reopen an appeal under this section only on a showing by the appellant that circumstances beyond his control prevent him from prosecuting his appeal.

* * *

§ 772.304 Evidence.

(a) *Coverage.* This section applies only to appeals under Subpart H of Part 315 of this chapter, Subparts B and C of Part 752 of this chapter, Part 754 of this chapter, and Subpart L of Part 831 of this chapter.

(b) *Evidence.* Statements of witnesses shall be by affidavit, when practicable, and relative to the adverse deci-

sion. It is the responsibility of both parties to the appeal to submit all evidence to the Chief, Appeals Examining Office, or to the regional director, as appropriate.

(c) *Availability of evidence and representations.* A representative of the Commission shall discuss all relevant representations and evidence with both parties and make the representations and evidence available to them for review. However, when adverse action has been taken, or decision on an application for disability retirement has been made, on the basis of a reported mental condition of the appellant or another condition of such a nature that a prudent physician would hesitate to inform a person suffering from it as to its exact nature and probable outcome, the representative of the Commission shall make the medical evidence available only to a duly licensed physician designated in writing by the appellant or the appellant's representative.

§ 772.305 Hearings.

(a) *Coverage.* This section applies only to appeals under Subpart B of Part 752 of this chapter, Part 754 of this chapter, and Subpart L of Part 831 of this chapter.

(b) *Right to a hearing.* An appellant is entitled to a hearing before the office of the Commission having initial jurisdiction of the appeal. That office shall inform the appellant of his right to a hearing. If the appellant does not desire a hearing, he shall so advise that office in writing.

(c) *Hearing procedures.* (1) An appellant is entitled to appear at the hearing on his appeal personally or through or accompanied by his representative. The agency is also entitled to participate in the hearing. Both parties are entitled to produce witnesses. The Commission is not authorized to subpoena witnesses.

(2) An agency shall make its employees available as witnesses at the hearing when (i) requested by the Commission after consideration of a request by the appellant or the agency and (ii) it is administratively practicable to comply with the request of the Commission. If the agency determines that it is not administratively practicable to comply with the request of the Commission, it shall submit to the Commission its written reasons for the declination. Employees of the agency shall be in a duty status during the time they are made available as witnesses. Employees of the agency shall be free from restraint, interference, coercion, discrimination, or reprisal in presenting their testimony.

(3) Hearings are not open to the public or the press. Attendance at hearings is limited to persons determined by the Commission to have a direct connection with the appeal.

(4) A representative of the Commission shall conduct the hearing and shall afford the parties opportunity to introduce evidence (including testimony and statements by the appellant, his representative, representatives of the agency, and witnesses), and to cross-examine witnesses. Testimony is under oath or affirmation. Rules of evidence are not applied strictly, but the representative of the Commission shall exclude irrelevant or unduly repetitious testimony.

(5) The office of the Commission having initial jurisdiction of the appeal shall determine how the hearing will be reported. When the hearing is reported verbatim, that office shall make the transcript a part of the record

of the proceedings and shall furnish a copy of the transcript to each party. When the hearing is not reported verbatim, the representative of the Commission who conducts the hearing shall make a suitable summary of pertinent portions of the testimony. When agreed to in writing by the parties, the summary constitutes the report of the hearing and is made a part of the record of the proceedings. Each party is entitled to be furnished a copy of the report of the hearing. If the representative of the Commission and the parties fail to agree on the summary the parties are entitled to submit written exceptions to any part of the summary which are made a part of the record of the proceedings for consideration in deciding the appeal.

§ 772.306 Decision on initial appeal.

(a) The office of the Commission having initial jurisdiction of the appeal, after making such investigation as it considers necessary, shall issue a written decision and send copies thereof to the appellant, his representative, and the agency. The decision on each appeal covered by this part shall contain findings, recommendations for any corrective action required, and notification of the right of either party to appeal to the Board of Appeals and Review. In addition, the decision on each appeal under Subpart H, Part 315, and Subparts B and C of Part 752, Part 754 of this chapter, and Subpart L of Part 831 of this chapter, shall include an analysis of the findings and a statement of the reasons for the conclusions reached. Except as provided in paragraph (b) of this section, the agency shall report, within 7 calendar days after receipt of the decision, that it has carried the decision into effect or that it is appealing the decision to the Board.

(b) When an employee makes a timely appeal to the Board of Appeals and Review under § 772.307 from a decision of the Appeals Examining Office affirming an adverse decision of the agency under Part 754 of this chapter or when an employee or agency makes a timely appeal under § 772.307 from a decision of the Appeals Examining Office or regional office affirming or reversing an adverse decision of the Bureau of Retirement and Insurance under Subpart L of Part 831 of this chapter, that decision may not be given effect until the Board of Appeals and Review had adjudicated the appeal.

§ 772.307 Further appeal to the Board of Appeals and Review.

(a) *Right of further appeal.* Both parties are entitled to appeal the decision on the initial appeal issued under § 772.306 to the Board of Appeals and Review, U.S. Civil Service Commission, Washington, D.C. 20415. An appeal to the Board of Appeals and Review shall be in writing, set forth the reasons for the appeal, and be filed with the Board within 15 calendar days after receipt of the decision on the initial appeal. The Board may extend the time limit in this paragraph when a party shows that circumstances beyond the control of the party prevented the filing of the appeal within the time limit.

(b) *Board procedures.* The Board of Appeals and Review shall review the record of the proceedings and all relevant written representations. There is no right to a hearing before the Board. The Board may, in its discretion, afford the parties an opportunity to appear personally and present oral arguments and representations.

(c) *Decision of the Board.* The Board of Appeals and Review shall issue a written decision and shall send copies thereof to the parties and to the employee's representative. The decision of the Board is final and there is no further right of appeal. When corrective action is recommended, the agency shall report promptly to the Board that the corrective action has been taken.

§ 772.303 Review by the Commission.

(a) The Commissioners may, in their discretion, reopen and reconsider any previous decision when the party requesting reopening submits written argument or evidence which tends to establish that:

(1) New and material evidence is available that was not readily available when the previous decision was issued;

(2) The previous decision involves an erroneous interpretation of law or regulation or a misapplication of established policy; or

(3) The previous decision is of a precedential nature involving a new or unreviewed policy consideration that may have effects beyond the actual case at hand, or is otherwise of such an exceptional nature as to merit the personal attention of the Commissioners.

(b) An agency request for reopening under paragraph (a) of this section shall not stay the corrective action recommended by the Board of Appeals and Review, but the immediate action in such a case may be by temporary appointment, temporary promotion, or temporary restoration to duty status to a position of like grade and pay pending final disposition of the case.

[36 F.R. 22052, Nov. 19, 1971]

* * *

PART 831 – RETIREMENT

Subpart A – Administration and General Provisions

Sec.
831.101 Administration.
831.102 Basic records.
831.103 Evidence.
831.104 Applications.
831.105 Computation of interest.
831.106 Disclosure of information.
831.107 Appeals.
831.108 Computation of time.

Subpart L – Disability Retirement on Application of an Agency and Disability Retirement Appeals

831.1201 Scope.
831.1202 General provisions.
831.1203 Agency action.
831.1204 Notice of receipt of application.
831.1205 Appeal and hearing.
831.1206 Duty status.

Authority: The provisions of this Part 831 issued under 5 U.S.C. 8347, unless otherwise noted.

Source: The provisions of this Part 831 appear at 33 F.R. 12498, Sept. 4, 1968, unless otherwise noted.

* * *

Subpart A – Administration and General Provisions

§ 831.101 Administration.

(a) The Commission has charge of the adjudication of all claims arising under subchapter III of chapter 83 of title 5, United States Code, and of all matters directly or indirectly concerned with these adjudications.

(b) In the adjudication of claims arising under subchapter III of chapter 83 of title 5, United States Code, the Commission shall consider and take appropriate action on counterclaims filed by the Government as set-offs against amounts in the Civil Service Retirement and Disability Fund.

(c) For purposes of this part, the term "Bureau" means the Bureau of Retirement, Insurance, and Occupational Health in the Commission.

[33 F.R. 12498, Sept. 4, 1968, as amended at 34 F.R. 17617, Oct. 31, 1969]

§ 831.102 Basic records.

Every Federal department, agency, corporation or branch whether executive, legislative, or judicial, and the District of Columbia Government (included in this part collectively in the term department or agency) having employees or Members of Congress (hereinafter referred to in this part as Members) subject to subchapter III of chapter 83 of title 5, United States Code, shall initiate and maintain retirement accounts for those employees and Members as prescribed in Federal Personnel Manual Supplement 831-1. (5 U.S.C. 8334)

* * *

Subpart L – Disability Retirement on Application of an Agency and Disability Retirement Appeals

§ 831.1201 Scope.

This subpart prescribes the procedures to be followed by:

(a) An agency in filing an application for the disability retirement of an employee, and

(b) The Commission in approving or disapproving an application for the disability retirement of an employee filed by an employee or an agency.

§ 831.1202 General provisions.

(a) An employee may designate a representative to advise and assist him with respect to matters arising under this subpart. When an employee has not designated a representative and the agency considers the interests of the employee so require, the agency may designate a representative to receive notices, determinations, decisions, or other written communications under this subpart. A notice, determination, decision, or document that is required to be served on an employee by this subpart shall also be served on the representative, and, if service on an employee cannot be obtained, service on the representative constitutes service on the employee. Service may be made personally or by mail.

(b) Reasons and findings that are required by this subpart to be given to an employee shall be specific and detailed except when the reasons or findings relate to details of a physical or mental condition about which a prudent physician would hesitate to inform the employee. In such a case only general reasons and findings are given to the employee and he is informed that, as provided in § 831.106 (a)(5), a full report of the medical evidence in his file will be made to a licensed physician whom he or his representative designates in writing for that purpose.

(c) When an agency initiates action that may result in the agency filing an application for the disability retirement of an employee, the agency shall establish an employee retirement file separate from the Official Personnel Folder. The agency shall file in the employee retirement

§ 831.1203 Agency action.

(a) *Fitness-for-duty examination.* When the agency has reason to believe an employee may be totally disabled within the meaning of paragraph (c)(1) of this section, and satisfactory medical evidence is not otherwise available, the agency may direct the employee to report for a fitness-for-duty examination. However, in the case of an employee with a suspected mental or emotional illness when the fitness-for-duty examination being considered is psychiatric, two of three agency officials (including a manager or supervisor, a personnel official, and a medical officer if available) must agree in the light of all available facts of the case that such an examination appears to be necessary. The employee is entitled to an advance written notice of the examination. The notice shall set forth the reasons for the examination and the general scope and character of the examination. An employee has the right to participate in the selection of another medical examiner if he objects to the first. When the refusal to submit to the examination appears to be the result of a mental, emotional, or nervous condition, and the employee does not want to participate in the selection of another medical examiner, the agency shall make a finding to this effect and continue to process the application for retirement on the basis of other available evidence.

(b) *Notice of proposed determination and answer.* When an agency determines that filing of an application for the disability retirement of an employee appears to be justified, it shall notify him in writing of:

(1) Its determination;

(2) The reasons for this determination;

(3) His right, or the right of his physician or representative to review the case file; and

(4) His right to answer orally or in writing or both, and to submit affidavits or documentary evidence or both, within a reasonable time to an official designated to receive the answer.

The reasonable time required depends on the facts and circumstances in each case but may not be less than 15 calendar days. The official designated to receive the answer shall have authority either to make the decision or to recommend the decision. An oral reply to the previously designated agency official must be summarized in writing and included in the case file. A copy, approved or supplemented by the employee, must also be included in the case file. The employee has 5 calendar days from the day he received the summary within which to amend and supplement the summary.

(c) *Disability standards.* An agency shall file an application for the disability retirement of an employee only when it certifies that:

(1) In its opinion the employee is totally disabled for useful and efficient service in the grade or class of position occupied (as shown by his performance or by a job-related factor) because of disease or injury not due to vicious habits, intemperance, or wilfull misconduct on his part within 5 years before becoming so disabled; and

(2) There is no suitable position vacant for which the employee is qualified and which he is willing to accept instead of retirement.

(d) *Decision.* The employee is entitled to a written decision from the agency at the earliest practicable date. The decision shall include a statement of findings and conclusions. When the decision is to file an application for disability retirement, the agency shall file the application

and retirement file with the regional office of the Commission or the Bureau as appropriate.

[33 F.R. 12498, Sept. 4, 1968, as amended at 34 F.R. 17618, Oct. 31, 1969]

§ 831.1204 Notice of receipt of application.

(a) The Commission office that receives the application first reviews it for compliance with the procedures in § 831.1203. If there has not been compliance, the Commission office remands the application to the agency and notifies the employee of the remand. If there has been compliance with the required procedures, the Commission office notifies the agency and the employee in writing that it has received the application. The same notice informs the employee that he is entitled to:

(1) Participate in the selection of a medical examiner when the Commission determines under § 831.502(a) that a medical examination is necessary;

(2) Be examined without cost to him; and

(3) Submit further relevant evidence as provided in the notice. A regional medical officer will forward the file to the Bureau upon completion of his action.

(b) Decision: After considering the employee's retirement file, the Bureau either approves or disapproves the application. The Bureau's decision shall be in writing and a copy shall be given to the employee and the agency concerned. The decision shall set forth the Bureau's findings and conclusions and shall inform the employee and the agency of the right of appeal and hearing provided by § 831.1205.

[34 F.R. 17618, Oct. 31, 1969]

§ 831.1205 Appeal and hearing.

(a) Right of appeal and hearing. An agency or an employee may appeal the decision of the Bureau that involves an application for disability retirement filed by an employee or by an agency to the Appeals Examining Office or a regional office of the Commission as appropriate. The appeal shall be in writing, set forth the reasons for the appeal, request a hearing if the appellant desires a hearing, and be filed with the appropriate office within 15 calendar days after receipt of the decision of the Bureau. The Appeals Examining Office or regional office of the Commission may extend this time limit for good cause shown.

(b) Subpart C of Part 772 of this chapter applies to appeals to the Commission from decisions of the Bureau involving applications for disability retirement.

[34 F.R. 17618, Oct. 31, 1969]

§ 831.1206 Duty status.

An agency shall retain an employee in an active duty status until it receives the decision of the Bureau on an agency application for disability retirement, except that the agency on the basis of medical evidence may place an employee on leave with his consent, or without his consent when the circumstances are such that his retention in an active duty status may result in damage to Government property, or may be detrimental to the interests of the Government, or injurious to the employee, his fellow workers, or the general public. If the leave account of the employee is or becomes exhausted, any suspension or involuntary leave without pay shall be affected in accordance with applicable laws, Executive orders, and regulations.

[34 F.R. 17618, Oct. 31, 1969]

APPENDIX O

C.S.C. FEDERAL PERSONNEL MANUAL

Chapter 306 – Selective Placement Program
Subchapter 8

Supp. 752-1 – Adverse Actions by Agencies

Supp. 831-1 – Subchapter S10 Disability Retirement

CHAPTER 306

SELECTIVE PLACEMENT PROGRAMS

Subchapter 8. Reassignment in Lieu of Disability Retirement

8-1. GENERAL

Executive branch policy on employment of the handicapped emphasizes the desirability of continued utilization, through reassignment, of on-board employees who because of illness or injury are unable to continue in their positions. This was specifically spelled out in the White House policy statement of September 6, 1961, directed to heads of agencies, as follows: "Disability retirement should be considered only after every feasible effort at reassignment has been made." As part of its role in facilitating the employment and utilization of the handicapped throughout the Federal service, the Commission has a definite responsibility to encourage the use of selective placement whenever it offers a feasible alternative to disability retirement.

8-2. AGENCY RESPONSIBILITY FOR EMPLOYEE UTILIZATION

a. *General.* Each agency is responsible for initiating action to secure the disability retirement of the eligible employee who is truly unfit for useful and efficient service because of physical or mental disability. There is, however, a further responsibility to retain the skills and services of the employee who, though unfit for service in his present position, is medically and otherwise qualified to perform service in another available position without detriment to himself or the Government.

b. *Disability retirement as last consideration.* Apparent eligibility for disability retirement should not automatically trigger the processing of a retirement application. Instead, where feasible, efforts at reassignment should begin when the necessity for it becomes evident rather than permitting continuation of a situation which is going to degenerate. Superior officers should be alert for indications that the employee is experiencing increasing difficulty in the performance of his duties. If the difficulty is the result of a physical or mental impairment, the superior officer should attempt to effect reassignment to a position within his jurisdiction. If no positions exist for which the employee is qualified, the case should be referred to the coordinator for the employment of the handicapped having jurisdiction over the place of employment, or, if a coordinator is not available, to the personnel office for consideration of:

(1) *Reassignment.* Knowledge of the employee's education and work experience may indicate that he can still perform efficiently in other work. Under certain circumstances an exception may be made to normal qualification standards to facilitate reassignment (see chapter 338, subchapter 4). Reassignment need not necessarily be limited to positions of the grade or class. The possibility that the employee would be willing to accept reassignment to a lower grade position with less strenuous physical or mental demands is not to be overlooked.

(2) *Retraining.* Agencies also should give serious consideration to the possibility of retraining disabled employees for positions for which they have the basic qualifications and capabilities. Although an initial expense is involved in retraining, the result will justify the expenditure if the employee and the position are matched carefully beforehand.

c. *Use of State services.* In exploring the feasibility of reassignment, with or without retraining, the coordinator or the personnel officer should utilize the expertise of the State office of vocational rehabilitation. A State rehabilitation counselor can be useful to the employee and the agency in selective placement efforts because of his knowledge of disabilities and job requirements and can make recommendations concerning vocational rehabilitation services.

d. *Effect on retirement eligibility.* Once an employee accepts reassignment to a position for which he is medically qualified, he voids his eligibility for disability retirement based on his inability to perform the duties of his previous position. To encourage the employee to accept reassignment on a trial basis and yet retain his eligibility, agencies can exercise the option of placing the employee on a detail assignment of up to six months. (This step may be particularly advisable when reassignment is to a position for which regular qualification standards are waived.) If performance in the new position is mutually acceptable to agency and employee, consideration then can be given to making the reassignment permanent.

e. *Placement in other agencies.* Efforts at reassignment of disabled employees should not end when there are no available positions within the coordinator's jurisdiction. Coordinators are responsible for maintaining effective liaison with the coordinators of other Federal establishments

accessible to them in the same geographical area for the interchange of information relative to agency needs and specific job opportunities. This avenue should be explored if no positions for which the employee qualifies exist in the employing agency.

8-3. AGENCY RESPONSIBILITY TO THE EMPLOYEE

a. *Discussion with employee.* Contact with disabled employees is necessary to appraise properly their qualifications and to work out reassignment. Where the issue of disability retirement versus reassignment is involved, the employee should be given a balanced presentation of the advantages and disadvantages of each course of action, as follows:

(1) In considering disability retirement, the employee should have a firm estimate of his annuity benefits and be made aware of the provisions of chapter 83 of title 5, United States Code, for discontinuance of disability annuity upon recovery or restoration to earning capacity. It is important that he should know that eligibility for disability retirement is contingent upon inability to perform useful and efficient service in the grade or class of position occupied and that if he accepts reassignment to a position for which he is not disabled, and later finds that the job is not to his liking, or that he cannot perform in it adequately for reasons unrelated to his physical condition, he cannot retire from it on account of disability. Alsc, the employee should know that if he accepts another position with a lower salary, it may reduce the amount of his insurance coverage under the life insurance program. Separation from service from a position for which the employee is physically and mentally qualified also may result in loss of health benefits

and life insurance coverage unless he is eligible for retirement on an immediate annuity with at least 12 years of creditable service.

8-4. COERCION NOT TO ENTER REASSIGNMENT EFFORTS

Nothing in this subchapter is to be construed as justification of an attempt to coerce an employee to accept reassignment or retraining against his will. Chapter 83 of title 5, United States Code, is specific concerning the eligibility requirements for disability retirement and the employee who meets those requirements is entitled to be so retired. The Commission fully recognizes that most disability applicants are in fact totally disabled for all employment. To the extent that positions are available, however, employing agencies are expected to assure that those employees who are qualified for further Government service in another grade or class of position have the opportunity to serve.

8-5. AGENCY CERTIFICATION OF REASSIGNMENT EFFORTS

Standard Form 2801-A, Superior Officer's Statement, is a required accompanying document for all applications for disability retirement. In this form a disability applicant's superior officer is required to state what efforts have been made to assign the applicant to any other job for which he is qualified. In addition to this statement, a certification is required from the responsible agency coordinator or, in the absence of a coordinator, the personnel officer of what further efforts he has made toward reassignment. This certification is to be a brief résumé of actions taken or a statement telling why the circumstances of the case preclude reassignment.

* * *

FPM SUPPLEMENT 752-1

ADVERSE ACTIONS BY AGENCIES

Subchapter S1. Action Coverage

S1-1. GENERAL

* * *

a. *Actions covered.* Except as provided in paragraph b of this section, part 752 applies to disciplinary and nondisciplinary removals, suspensions, furloughs without pay, and reductions in rank or pay.

b. *Actions not covered.* (1) * * *

(2) *Actions under parts 351, 733, 754 and 831.* The Commission excludes from the regulations in part 752 removals, suspensions, furloughs without pay, and reductions in rank or pay which are regulated by other parts:

* * *

(d) Involuntary retirement subject to subpart L of part 831.

* * *

S1-2. VOLUNTARY AND INVOLUNTARY SEPARATIONS AND REDUCTIONS

a. General. (1) Separations and reductions in rank or pay voluntarily initiated by an employee are by their very nature actions which do not require the use of adverse action procedures. On the other hand, a normally voluntary action – i.e., a resignation, optional retirement, or reduction in rank or pay at the employee's request – is an adverse action if it is obtained by duress, time pressure, in-

timidation, or deception. Whether an action is voluntary or involuntary is determined not by the form of the action, but by the circumstances that produced it.

(2) The Commission holds that an action requested by an employee is voluntary only if the employee has freedom of choice. The general principle is that an action is voluntary if the employee is free to choose, understands the transaction, is given a reasonable time to make his choice, and is permitted to set the effective date. (See *McGucken v. U.S.* for similar characteristics the courts consider when determining the voluntariness of an action.)

(3) It is proper for an agency to initiate a discussion with an employee in which he is given an election between leaving his position voluntarily (by resignation, optional retirement, or requesting a reduction in rank or pay) or having the agency initiate formal action against him. It is also proper for the agency in the course of the discussion to advise the employee which of the possible alternatives will be in his best interests. The fact that the employee may be faced with an inherently unpleasant situation, or that his choice may be limited to two unpleasant alternatives, does not make the resulting action an involuntary action. However, if the agency uses deception, duress, time pressure, or intimidation to force him to choose a particular course of action, the action is involuntary.

b. *Involuntary actions.* (1) *Employee deceived.* Agencies should be particularly cautious about assuring an employee that a voluntary separation, as opposed to a removal for cause, will leave his record unblemished. Instructions in FPM SUPPLEMENT 296-31 require the recording of suitability information on the Standard Form 50 in cases in which an agency has established derogatory facts and has made a decision to propose or take an ad-

verse action based on this information, provided a notice of the decision has been issued to the employee or he has been orally informed of the agency's decision to issue this kind of a notice. Thus, if an employee is influenced to separate voluntarily because of his agency's assurance that this action will leave him with a clear record in his Official Personnel Folder and if the agency then enters any unfavorable information on the SF 50, the agency has deceived the employee.

(2) *Employee not competent to choose.* The resignation of an employee whose mental condition precluded him from exercising free will, or from understanding the transaction, would be an involuntary resignation and thus void. When there is substantial medical and other evidence about an employee's mental condition which casts doubt on his understanding the alternatives involved, the agency should not encourage the employee's resignation. Instead, if the agency desires to separate the employee, it should initiate action to separate him by disability retirement or by adverse action procedures (see S1-3a(5)).

(3) *Employee not given reasonable time to consider alternatives.* An action is involuntary if an employee is not given a reasonable time to choose between alternatives. How much time is reasonable has no fixed answer. A reasonable time depends on the particular circumstances of the case and what the employee wants time to do – e.g., consult a lawyer, discuss the situation with his family, or just think it over. The court supplied some guidance for determining a reasonable time in the case of *Paroczay v. Hodges.* This case was decided for the employee because the agency demanded an *immediate* resignation. The court said:

> "* * * plaintiff according to his affidavit, was pressed into an immediate decision at the interview; he was

then faced for the first time with being charged with serious misconduct unless he resigned then and there. * * * We adhere to our decision [in the case of *Rich v. Mitchell*] but we think the facts in the present case [*Paroczay*] are sufficiently different to lead to a different result. In *Rich* there was no demand for an immediate resignation under threat of immediate charges. The employee was not told to 'sign now'. He was given three days within which to consider the course he would adopt. A request for opportunity to consult family and friends was not rejected, as plaintiff's affidavit states occurred in this case."

An agency, therefore, may not safely require the employee to make an immediate decision. The agency must bear in mind that, even in emergency situations when there is urgent need to get him off the premises, the employee may be carried on appropriate leave with his consent or may be carried in a nonduty status with pay and without charge to leave for up to five calendar days without his consent.

(4) *Employee does not set effective date.* An action is involuntary if the employee does not set the effective date. The agency may point out the desirability of another date, but it may not arbitrarily set an earlier or later date and have the action remain a voluntary one.

S1-3. REMOVALS

a. *Removals covered by part* 752. Except as provided in S1-1, a removal within the meaning of law and the Commission's regulations in part 752 is a separation based on a decision of an administrative officer (i.e., an involuntary separation). The following are examples of both disciplinary and nondisciplinary removals covered by part 752.

Some other actions that may warrant removal are listed in S3-3.

* * *

(5) *Mental or physical disability.* Mental or physical disability may warrant removal under procedures in part 752. Before the agency initiates a removal for disability, however, it should be aware of the special provisions of this subparagraph.

(a) A definite duty devolves upon the agency to give retirement counseling to an employee who is unable to work satisfactorily because of ill health, if he has five years of civilian service and appears to meet the medical requirements for disability. If the disabling condition is mental, the agency must file disability retirement application on behalf of the employee if he will not or cannot file for himself (see FPM SUPPLEMENT 831-1 for the procedure). Under the rule laid down in *Anderson v. Morgan* and 39 Comp. Gen. 89, it is an error to remove for disability reasons the 5-year employee whose mental condition impairs his judgment and ability to make decisions without first applying for disability retirement on his behalf.

(b) If it is determined that removal (rather than reassignment or retirement) is in order, the agency should obtain a complete and detailed report of physical examination without cost to the employee. The employee should be referred for medical examination with a statement of the particular demands of the position and a statement of how the employee's performance or behavior fails to meet these demands. (See subchapter 1 of FPM chapter 339 for a discussion of arrangements for medical exam-

inations by Federal medical officers or by other physicians.) This medical report is furnished to the Commission, upon its request, for appellate review of the removal or for other purposes.

(c) The agency has authority to direct an employee to take a fitness-for-duty examination. This authority is clearly implied by the language of section 01.3 of Executive Order 9830. Section 01.3 provides that "the head of each agency shall remove, demote, or reassign to another position any employee in the competitive service whose conduct or capacity is such that his removal, demotion, or reassignment will promote the efficiency of the service." The word *capacity* includes physical and mental capacity. The authority to require a fitness-for-duty examination is also implied in those sections of title 5, United States Code, which require that a person being removed from the competitive service be given reasons for the removal and in that section which authorizes agencies to apply for the retirement of employees on disability. To comply with the requirements of this Executive order and law, an agency that has a question about the physical or mental capacity of an employee should have a medical report from a physician who has examined the employee.

(d) If the employee refuses to submit to a medical examination, he may be removed for refusing (see *May v. USCSC* and *Yates v. Manale*). An agency, however, could not justify on appeal an adverse action against an employee who refuses to be examined by an agency-designated physician but who is willing to be examined by a physician of his choice selected under the provisions of subchapter 1 of FPM chapter 339 (paragraph 1-3c).

(e) If the employee refuses to submit to a medical examination or it is otherwise not practicable to obtain a medical opinion, action may be taken on the basis of deficiencies in performance or conduct.

(f) The agency must not rely solely upon a showing that the employee has a disabling condition, even when the agency has obtained a medical opinion of incapacity. Neither the placement of limitations on the duties which an employee is permitted to perform nor medical conclusions about the employee's physical condition is sufficient cause for taking adverse action. The agency must establish a link between the medical conclusion and (i) observed deficiencies in work performance or employee behavior or (ii) high probability of hazard when the disabling condition may result in injury to the employee or others because of the kind of work the employee does. When an agency can clearly show high probability of serious hazard – for example, an agency has indisputable evidence that a truck driver with epilepsy is subject to grand mal seizures – the agency does not have to wait for the employee to have a serious accident on the job before taking adverse action. The medical evidence linked with the showing of potential hazard would be sufficient cause for taking adverse action. In all other cases, however, the agency must link the medical conclusion with observed deficiencies in work performance or employee behavior.

(g) The advance notice may include a summary of the medical opinion, when practicable, but not if the medical officer believes that the information might be harmful to the employee if it were released to him; in that case it should not mention the medi-

cal record but base the action solely upon those demonstrated deficiencies in performance or conduct which warrant removal.

(h) If the employee is not in a duty status, the advance notice may rely partially on the agency's need for the employee's services.

b. *Removals not covered by part* 752. As explained in S1-1b, some removals are not covered by part 752. The following are examples, with pertinent court cases:

(1) Removal excluded by 5 U.S.C. 7532, except the exclusion does not apply to a nonsensitive position (*Cole v. Young*);

(2) Disability retirement (*Ellmore v. Brucker* and *Murphy v. Wilson*);

(3) Voluntary resignation (*Popham v. U.S.* and *Rich v. Mitchell*).

• • •

Subchapter S10. Disability Retirement

S10-1. ELIGIBILITY

a. *Requirements.* An employee under the retirement system must meet all of the following conditions to be eligible for an immediate annuity because of disability retirement:

(1) He must have completed at least five years of civilian service.

(2) He must, while employed subject to the retirement system, have become totally disabled for useful and efficient service in his position or any other position of the same grade or class.

(3) The disease or injury which caused the disability must not be the result of vicious habits, intemperance, or willful misconduct on his part within the 5-year period immediately prior to becoming disabled.

(4) The application for disability retirement must be filed with the Civil Service Commission as specified in section S10-3.

b. *One-out-of-two-years service requirement not applicable.* The general requirement that an employee must, within the 2-year period preceding his separation from service, have completed at least one year of civilian service to be eligible for annuity under the retirement system is not applicable in the case of an employee retiring for disability.

c. *Agency responsibility to reassign employee.* Executive branch policy on employment of the handicapped emphasizes the desirability of continued utilization, through reassignment, of an employee who becomes disabled for his position. Apparent eligibility for disability retirement should not automatically trigger the filing of a retirement application. Instead, if the disability is the result of a physical or mental impairment, the superior officer should attempt to effect reassignment to a position within his jurisdiction. If no positions of this kind exist, the matter should be referred to the coordinator for the employment of the handicapped or, if a coordinator is not available, to the personnel office. See FPM Chapter 306, Subchapter 8, Reassignment in Lieu of Disability Retirement.

S10-2. WHO MAY FILE APPLICATION

a. The employee must apply for disability retirement, except in the following cases:

(1) When an agency considers acting upon deficiencies in an employee's service caused by a possible health problem, and if the employee refuses to apply, the agency may apply for him.

(2) If he is mentally incompetent, the agency, his guardian, his relative, or some other interested person may apply in his behalf.

• • •

S10-5. AGENCY RESPONSIBILITY FOR COUNSELING

a. *In general.* Generally, an employee who has a large accumulation of sick leave should defer filing an application for disability retirement until his leave reaches a bal-

ance of approximately 60 days. The agency should give every assistance to the employee in completing his application by helping him to select the type of annuity best suited to his circumstances, explaining the effect of making deposit or redeposit, obtaining the necessary statement from the employee's superior officer, explaining the requirement of a physician's statement, and getting a statement from the employee to accompany his application showing any unverified prior service with other agencies. If he is unable to work, the agency should carry him in a leave status (with or without pay) until notified by the Civil Service Commission of its action on the application.

b. *Disability retirement versus other separation.* If an employee submits his resignation because of ill health and meets the service requirement for disability retirement, the agency should discuss with him the advisability of applying for disability retirement before acting on his resignation. Whether or not a resignation is submitted, a definite duty devolves upon the agency to give retirement counseling to an employee who is unable to work or to work satisfactorily because of ill health, if he has five years of civilian service and appears to meet the medical requirements for disability retirement. The agency should, if the disabling condition is mental, file disability retirement application on behalf of the employee. Under the rule laid down in *Anderson v. Morgan,* 263 F.2d 903, and 39 Comp. Gen. 89, it is an error to separate for disability reasons the 5-year employee whose mental condition impairs his judgment and ability to make decisions without first applying for disability retirement on his behalf, and any separation of this kind is subject to cancellation.

• • •

S10-10. FILED-BY-AGENCY DISABILITY RETIREMENT PROCEDURES

a. Procedural responsibilities of agency when it considers acting upon deficiencies in an employee's service caused by a possible health problem. (1) *Procedures.* An agency should follow the procedures prescribed by the regulations if the deficiencies in an employee's service, conduct, or attendance are such that removal may be necessary to promote the efficiency of the service, of if the employee's behavior or physical condition is such that it presents a significant disruptive influence or risk to the safety of others in the work environment. These procedures are of two types: Those that are *required* and those that are *recommended* as good personnel practices. The required procedures must be observed in every case. The Civil Service Commission will remand to agencies without action any agency-filed disability retirement case which indicates lack of conformance with required procedures. Failure of an agency to follow recommended procedures will not be cause for remanding or, in itself, a basis for denial of the application. An employee has the right to be represented at any time during these procedures. Hereafter in this section, the word *employee* includes the concept of representative where appropriate, and all rights, notices, etc. are available to representatives.

(2) *Making preliminary decision*

(a) The agency is required to make a preliminary determination that the employee's "performance, attendance, or behavior" is below the level of acceptability, and on the basis of management evidence, that a health problem exists which could account for the service deficiencies. Management evidence means information obtained from such observation

of job performance, absence from duty, or knowledge of illness, accident, or hospitalization.

(b) It is recommended that supervisors and personnel officials consult informally with the agency medical officer to explore possible medical solutions to the employee's problems.

(3) *Establishing a prima facie case.* The agency is required to establish a prima facie case in *record* evidence that (a) the employee's service is not useful and efficient (based on performance, attendance, behavior, etc.) and (b) the apparent cause is a mental or physical illness or injury not of a transient nature. The prima facie case will document primarily deficiencies in the employee's service rather than his alleged illness or injury. Except where an issue of safety of life or property or an issue of security clearance can be decided only upon the basis of the state of physical or mental health of the employeee, to be sufficient, the available evidence should be such that it will warrant consideration of the employee's removal from the service under adverse action procedures if medical findings do not support disability retirement.

(4) *Conducting a counseling session*

(a) It is recommended that, if possible, the agency have a counseling session with the employee to discuss the problem and to inform the employee thoroughly of the advantages and disadvantages of the various alternatives open to him, before any formal action is initiated. A transcript need not be made of this session. If a counseling session is not held, the reasons should be given in the record. One of the primary purposes of the counseling session is to explore with the employee

the possibility of reassignment to another position. An agency should make a conscientious search and should consider the employee's potential value for retraining for a different type of work.

(b) The agencies are reminded that executive branch policy encourages maximum use of the services of the agency coordinators for the employment of the handicapped. Instructions pertaining to reassignment in lieu of disability retirement appear in FPM chapter 306, subchapter 8. The coordinator will also be able to provide information on vocational rehabilitation made available through the counselors from the various State agencies. The counselor from the State vocational rehabilitation agency can be useful to the employee and the agency in selective placement efforts because of his knowledge of disabilities and job requirements, and can make recommendations regarding vocational rehabilitation services. The agency may assist an employee in availing himself of the services offered by a vocational rehabilitation agency, but this assistance has no effect on any action taken under instructions in this supplement or related instructions appearing elsewhere in the FEDERAL PERSONNEL MANUAL.

(c) The agency should not overlook the possibilities of transfer of the employee to a position in another agency. An employee's failure to choose reassignment at this time should *not* be considered final. Offers should be held open, if possible, and any other opportunities that arise before the employee's separation should be explored.

(5) *Obtaining medical evidence*

(a) If the counseling session has not made an alternative course of action possible, the agency may direct the employee to report for a fitness-for-duty examination as instructed by the following paragraphs. If evidence already available is apparently sufficient (preferably in the judgment of a medical officer, particularly when a possible mental illness is indicated) to establish that the deficiencies in the employee's service are caused by disease or injury, such an examination would be unnecessary.

(b) When the agency has decided that available medical evidence is apparently inadequate, the employee's supervisor or other manager familiar with the employee's performance on the job must decide, with the assistance of any available medical advice, whether the possible health problem(s) affecting the employee's service can be evaluated by a general physical examination, an examination by a specialist in a physical disorder, or a psychiatric examination. If a general physical examination or an examination by a specialist in a physical disorder is indicated, the agency may order an appropriate fitness-for-duty examination, as follows:

(i) A written notice must be prepared to order the employee to report for the examination. This notice must inform the employee of the reasons for the examination. This notice must also provide instructions to the employee on how to participate in the selection of a medical examiner if he desires to do so. An employee has the right to be represented, and

should be so informed by this notice (see (c) (ii)*1* below).

(ii) If an employee objects to being examined and is unwilling to select a different medical examiner, the agency may consider bringing charges against the employee which may *include* a charge of refusing to report for an examination as directed.

(iii) When a medical examiner is selected and an examination scheduled, all available information pertinent to the employee's possible health problem is presented to the medical examiner named by the agency to serve as background for his examination. Any information presented to the medical examiner is also made available to the employee or a physician designated by the employee in writing for this purpose.

(iv) The medical examiner will be asked to state his opinion on whether the employee should be given further testing or examination. Further examination may not be ordered unless recommended by the medical examiner.

(c) If the employee's supervisor or other manager familiar with the employee's performance on the job decides that the behavior of the employee has been such as to raise the possibility that the illness is mental or emotional, and recommends a psychiatric examination, or if a physical examination was made and the medical examiner recommends a psychiatric examination:

(1) An employee may not be ordered to report for a psychiatric examination unless a majority of a panel of at least three agency officials agree that the circumstances warrant such action.

(ii) If a majority of the agency panel agrees that a psychiatric examination is indicated, such an examination will be ordered as follows:

1. If a psychiatric examination is to be ordered, appointment of a representative is required. An employee may name a representative himself, at any time, but if he fails to name one voluntarily, the agency should urge him to do so before ordering a fitness-for-duty psychiatric examination and offer him assistance by naming the kinds of persons who make good representatives. If the employee does not name a representative at the agency's urging, the agency must appoint a representative who will receive copies of all notices, determinations, decisions, or other written communications issued to the employee under these procedures.

2. A written notice to the employee must be prepared to order the examination as above.

3. If the employee objects to the medical examiner named by the agency, he will be asked to submit the names of three to five board-certified psychiatrists to whom he would be willing to report. The agency will then select a medical examiner from the list and arrange an examination.

4. When a medical examiner is selected and an examination scheduled, all available informa-

tion pertinent to the employee's possible health problem is presented to the medical examiner to serve as background for his examination. The agency will make available only to a licensed physician, designated in writing for that purpose by the employee or his representative, a full report of the medical evidence in his file including a copy of the reported behavior irregularities or manifestations of unsatisfactory service.

5. If the employee refuses to cooperate altogether, the agency must document all instances of alleged behavioral deficiencies on which the decision to order a psychiatric examination was based. This lay evidence may serve as the basis for an agency-filed application for disability retirement in the case of an emotionally disturbed employee.

(d) If the agency selects a representative, it may choose a family member, union officer, veteran's service officer, or if no other representative is available, an employee of the agency. An employee should be chosen as representative only as a last resort and he should not be an employee under the jurisdiction of the supervisor initiating the request for disability retirement. An ideal agency panel to consider whether a psychiatric examination should be ordered would include an immediate *supervisor or manager, a personnel official, and an agency medical officer if one is available*, but other officials may be used when necessary. Members of such a panel do not have to actually hold a meeting to reach a decision on the file.

(6) *Duty status.* The agency is required to retain an employee in an active-duty status pending decision of the Bureau of Retirement, Insurance, and Occupational Health on an agency application for disability retirement, except that the agency on the basis of medical evidence may place an employee on leave with his consent, or without his consent when the circumstances are such that his retention in an active-duty status may result in damage to Government property, or may be detrimental to the interests of the Government, or injurious to the employee, his fellow workers, or the general public. If the leave account of the employee is or becomes exhausted, any suspension or involuntary leave without pay must be effected in accordance with applicable laws, Executive orders, and regulations.

(7) *Making tentative determination.* On the basis of all available evidence, the agency is required to decide whether deficiencies in the employee's service are caused by illness or injury. If not, adverse procedures may be instituted if warranted. If the agency decides that deficiencies in the employee's service (performance, attendance, behavior, etc.) are established and are caused by disease or injury, it must notify the employee of this tentative determination that he meets all requirements to be retired for disability. The notice must:

(a) Be in writing;

(b) Give reasons for tentative determinations;[1]

---

[1] Where a prudent physician would hesitate to inform the employee fully of the details of his physical or mental condition, details of the medical evidence will not be given to the employee, but must be given only to a licensed physician designated in writing for that purpose by the employee or by his designated representative. Medical evidence will be given to the designated licensed

(c) Include an explanation of the employee's right to reply orally, or in writing, or both, within a specific reasonable time, but no less than 15 calendar days; instructions for submitting his reply; and an explanation of his right to representation, if a represetative has not already been designated;

(d) Advise him of his right (or that of his physician or representative, or both) to review the case file and to obtain copies of the medical findings at no expense to him; and

(e) Name the official designated to receive employee's oral reply.

(8) *Answering tentative determination.* If the employee answers the agency notice of tentative determination, all documentary evidence (i.e., medical reports, hospital records, affidavits, or statements) offered by the employee or his representative must be received, considered, and included in the case file. An oral reply to the previously designated agency official must be summarized in writing and included in the case file. An additional copy, approved or supplemented by the employee, must be included in the case file. The employee may amend his copy of the summary or submit correction or supplementation within five calendar days. The designated agency official may make or recommend the decision on whether to file an application for the employee's retirement on disability, subject to the provisions of paragraph (9) following.

---

physician with the understanding that he may use his own professional judgment in deciding how much information to disclose to his patient or the patient's representative. Rather than exercise discretion, an agency may in all cases give the medical evidence only to a licensed physician.

(9) *Exploring alternatives, making final decision, and acting on decision*

(a) No employee will be retired on disability when the application is filed by the agency without a certification that there is no suitable position vacant for which the employee is qualified and which he is willing to accept in lieu of retirement. This certification will be made by completing item 15 on SF 2801-A, Superior Officer's Statement. See also FPM chapter 306, subchapter 8.

(b) The agency records its opinion on whether the deficiencies in the employee's service are caused by disease or injury not due to vicious habits, intemperance, or willful misconduct within the preceding five years and gives notice to the employee which must:

(i) Be in writing;

(ii) Contain a statement of findings and conclusions;

(iii) Inform the employee of the agency's decision (i.e., no action, reassignment, or that the agency has filed application for his disability retirement).

(c) If it is decided that the employee should be retired, the agency will file an application for his disability retirement with the Civil Service Commission and transmit the entire file. The application should be signed by an official delegated authority to sign for the agency head in personnel matters under chapter 3, section 302, title 5, United States Code.

b. *Adjudication by Civil Service Commission upon receipt of agency-filed application for disability retirement.*

(1) *Reviewing file* (a) The Commission may return the entire case file to the agency if the required procedures were not observed. The employee will be notified if the case is returned for this reason. If the case file conforms to required procedures, the Commission notifies the employee and the agency of receipt of the application. The same notice informs the employee of the following:

(i) His right to be examined without cost to him and of his right to participate in selection of the medical examiner).

(ii) His right to submit medical or lay evidence on his medical condition or job performance.

(ii) The necessity of an examination to obtain further evidence. If the employee refuses to report for an examination and the evidence on file is not sufficient for a decision, the case may be returned to the agency for such action as the circumstance warrants.

(2) *Notification of Commission decision.* When all evidence is evaluated, the Commission's Bureau of Retirement, Insurance, and Occupational Health makes its decision and notifies the agency and the employee. The party adversely affected may appeal within 15 days and may request a hearing. The notice of decision will give full instructions on how to appeal the decision to the Commission's Appeals Examining Office or an appropriate regional office, and how to request a hearing.

(3) *Appeals.* (a) If an employee or agency appeals from the decision of the Bureau of Retirement, Insurance, and Occupational Health, the appeal will be considered under the procedures currently in force for appeals from decisions made by the Commission's Bureau of Personnel In-

vestigations under part 754 of the civil service regulations. Part 754 of the regulations pertain to adverse actions taken against employees by agencies at the direction of the Commission. Instructions covering appeals to the Commission under part 754 appear in FPM chapter 772, subchapter 3-2.

(i) Either the agency or the employee may request a hearing, which will be conducted by the Appeals Examining Office or the appropriate regional office. The convenience of all parties concerned will be considered in determining the location of the hearing. If no hearing is requested, the decision on the appeal will be based on the written record. When necessary to resolve a medical question, the appeals examiner may obtain the advice of any disinterested physician. Both the agency and the employee will be notified of the decision.

(ii) Within 15 calendar days of receipt of the notice, either the employee or the agency may further appeal to the Board of Appeals and Review. The decision of the Board is final, and there is no further right to appeal. There is no right to a hearing before the Board.

APPENDIX P

AGENCY REGULATIONS

OSD Administrative Instruction No. 5,
dated 20 January 1970

OSD Administrative Instruction No. 70,
dated 14 September 1974

OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, D.C. 20301

ADMINISTRATION

ADMINISTRATIVE INSTRUCTION NO. 5 — 20 JAN 1970

SUBJECT: Disability Retirement

Refs: (a) FMP [sic] Supplement 831-1, Subchapter S-10, "Disability Retirement"

(b) FPM 339, Subchapter 6, "Reassignment in Lieu of Disability Retirement"

I. PURPOSE

The purpose of this Instruction is to provide policies and procedures for use in initiating both voluntary and involuntary Disability Retirement for civilian employees.

II. POLICY

A. An employee under the retirement system must meet all of the following conditions to be eligible for an immediate annuity because of disability retirement; he must have completed at least five years of civilian service; while employed subject to the retirement system, he must have become totally disabled for useful and efficient ser-

vice in his position or any other position of the same grade or class; the disease or injury which caused the disability must not be the result of vicious habits, intemperance, or willful misconduct on his part within the 5-year period immediately prior to becoming disabled; the application for disability reitrement must be filed with the Civil Service Commission.

B. The employee must apply for disability retirement; except; [sic] when an agency considers acting upon deficiencies in an employee's service caused by a possible health problem, and if the employee refuses to apply, the agency may apply for him; if he is mentally incompetent, the agency, his guardian, his relative, or some other interested person may apply in his behalf.

C. An employee will normally remain in an active duty status until a final decision is made on an application for disability retirement by the Civil Service Commission. However, on the basis of medical evidence, an employee may be placed on leave, with or without his consent when the circumstances are such that his retention in an active duty status may result in damage to Government property, may be detrimental to the interests of the Government, or may be injurious to the employee, his fellow workers, or the general public.

D. Unless there is other evidence acceptable to the Civil Service Commission, no employee may retire for disability until he has been examined by a Federal medical officer or other physician designated by the Commission.

III. SCOPE

This Instruction is applicable to all organizational entities of the Office of the Secretary of Defense, Organi-

zation of the Joint Chiefs of Staff, and to other activities assigned to OSD for administrative support.

IV. RESPONSIBILITIES

A. *The Director of Personnel, OASD (Administration)* is responsible for:

1. Counseling employees on health problems, retirement procedures and employees' rights.

2. Exploring alternatives, such as the reassignment of an employee who becomes disabled for his position.

3. Providing every assistance to the employee by helping him to select the type of annuity best suited to his circumstances, obtaining necessary statements and making arrangements for examinations.

B. *Supervisors* are responsible for:

1. Evaluating their employees performance, attendance and behavior.

2. Consulting informally with the Director of Personnel, OASD (A) and medical officers to explore; when necessary, medical solutions to an employee's problems.

C. *Employees are responsible for:*

1. Making application for Voluntary Disability Retirement.

2. Obtaining a complete medical report from the attending physician, a report of any hospitalization for an ailment or disease related to the disability; and a statement from his superior.

V. PROCEDURES

A. *General:*

When an application is made by the employee, his guardian, or some other interested person, it must be made before separation or within one year thereafter; if made by the agency, the application must be filed with the Civil Service Commission before the employee is separated.

B. *Voluntary Disability Retirement:*

1. *The Employee* applying for Disability Retirement will:

a. Complete Standard Form 2801 "Application for Retirement".

b. Obtain a complete medical report of the attending physician.

c. Obtain a completed Standard Form 2801-A "Superior Officers Statement" from his immediate superior.

d. Forward the completed application and supporting statements from his physician, hospital and superior to the Civil Service Commission through the Director, Personnel Division, OASD (A).

2. *The Director of Personnel,* OASD (Administration) will:

a. Counsel the employee making an application for disability retirement.

b. Make arrangements, when necessary for the medical examination of the employee by a Federal medical officer.

c. Forward the properly completed application and supporting medical statements to the Civil Service Commission.

C. *Agency Filed Disability Retirement:*

1. *The Immediate Supervisors* will:

a. Make a preliminary determination that an employee's performance, attendance, or behavior is below the level of acceptability, and that a health problem exists that could account for this deficiency.

b. Consult with the appropriate representative of the Personnel Division, OASD (A), to determine what action should be taken.

c. Consider possibilities for reassignment of the employee or other possible alternatives.

d. Jointly, with a representative from the Personnel Division, OASD (A), counsel the employee on the problem and discuss possible solutions.

e. After all other alternatives are exhausted, prepare a request to the Director of Personnel, OASD (A), that the employee be scheduled for a fitness-for-duty examination.

2. *The Director of Personnel, OASD (Administration)* will:

a. Prepare a memorandum to the Medical Examiner, Civilian Employees' Health Service requesting a medical opinion and/or arranging any physical examination deemed necessary.

b. Prepare a written notice to the employee advising him that a fitness-for-duty examination has been scheduled and notify the employee of his rights. The

notice should provide instructions to the employee on how to participate in the selection of a medical examiner if he so desires.

c. Request the medical examiner to state his opinion on whether the employee should be given further testing or examination. Further examination may not be ordered unless recommended by the medical examiner.

d. When a psychiatric examination appears necessary and is recommended by the medical examiner; appoint a panel, consisting of a representative of the Personnel Divison, Medical Officer, and a Supervisory Offical to consider the circumstances and determine whether such examination is warranted.

e. When a majority of the panel agree that a psychiatric examination should be made, the examination will be ordered as follows:

(1) Arrange to have the employee name a representative. This may be done by the employee at any time. However, if he fails to name one voluntarily, assistance will be afforded. In the event the employee does not name a representati , a representative will be appointed for the employee who will receive copies of all notices, determinations, decisions or other written communications issued to the employee. The representative selected may be a family member, union officer, veteran's service officer, or if no other representative is available, an employee of OSD.

(2) Prepare a notice to the employee ordering the fitness-for-duty psychiatric examination.

(3) When the employee objects to the medical examiner named by OSD, he will be asked to submit the names of 3 to 5 certified psychiatrists to

whom he would be willing to report. A selection will then be made from the list and arrangements made for an examination by the Director of Personnel.

f. On the basis of all available evidence, decide whether deficiencies in the employee's service are caused by illness or injury. It [sic] it is decided that deficiencies in the employee's service (performance, attendance, behavior, etc.) are established and are caused by disease or injury, the Director of Personnel will then notify the employee of this tentative determination that he meets all requirements to be retired for disability. The notice will:

(1) Be in writing;

(2) Give reasons for the tentative determinations;

(3) Include an explanation of the employee's right to reply orally, or in writing, or both, within a specific reasonable time, but no less than 15 calendar days; instructions for submitting his reply; and an explanation of his right to representation, if a representative has not already been designated;

(4) Advise him of his right (or that of his pysician or representative, or both) to review the case file and to obtain copies of the medical findings at no expense to him; and

(5) Name the official designated to receive employee's oral reply.

g. After consideration of the employee's reply, if any, and with the concurrence of the employee's immediate supervisor, inform the employee in writing of the final decision.

h. If it is decided that the employee should be retired, file an application for his disability retirement with the Civil Service Commission.

VI. APPEALS

A. The Civil Service Commission has authority to finally approve or disapprove an application for retirement. Therefore, the employee does not have appeal rights within the agency on agency initiated retirements for disability. When the case is submitted to the Commission, the employee will be informed of his rights (to be examined and to present additional evidence) prior to adjudication of the case and of his appeal rights after decision by the CSC's Bureau of Retirement and Insurance.

B. The party adversely affected may appeal the decision to the Commission Appeals Examining Office within 15 days and request a hearing. If no hearing is requested the decision on the appeal will be based on the written record. Both the agency and the employee will be notified of the decision.

C. Within 15 calendar days of receipt of the notice either the employee or the agency may further appeal to the Board of Appeals and Review. The decision of the Board is final.

VII. EFFECTIVE DATE

This instruction is effective upon publication.

/s/ D. O. Cooke
D. O. Cooke
Principal Deputy

OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, D.C. 20301

14 SEP 1974

ADMINISTRATIVE INSTRUCTION NO. 70

Refs: (a) AI No. 70, "Administrative Appeals" dated July 12, 1971 (hereby cancelled)

(b) Part 752 and Part 772 Civil Service Regulations FPM Supplement 990-1

(c) FPM letter 772-7 dated July 5, 1974

I. PURPOSE

The purpose of this Instruction is to provide guidance as to the method through which an employee may appeal an adverse action taken against him.

II. POLICY

All appeals by employees from adverse actions (removal, suspension for more than 30 days, furlough without pay, other personnel actions which reduces rank, status or pay) as covered under III B below will be submitted to the Federal Employee Appeal Authority (FEAA) of the Civil Service Commission at any time after receipt of the notice of adverse decision, but not later than 15 days after the effective date of the action. Nothing in this regulation shall be used to preclude negotiations at OSD field activities or items which are otherwise negotiable under E. O. 11491.

III. SCOPE

A. This Instruction is applicable to civilian personnel assigned to all organizational entities of the Office of

the Secretary of Defense, the Organization of the Joint Chiefs of Staff and other activities assigned to OSD for administrative support.

B. An appeal under this Instruction is limited to any employee who has received a notice of a decision to effect an adverse action (removal, suspension for more than 30 days, furlough without pay, other personnel action which reduces rank, status or pay) and who:

1. Is a career, career-conditional, indefinite or term employee, or any employee serving under a career executive assignment in a competitive position and is not serving a probationary or trial period; or

2. Is serving in a competitive position, and has completed one year of current continuous employment unless he is serving under a temporary appointment with a definite time limitation or a limted executive assignment; or

3. Has competitive status, occupies a position except under Schedule B of Part 213, Civil Service Regulations and is serving under a non-temporary appointment.

4. Any preference eligible employee, who has completed one year of continuous employment in a position outside the competitive service.

C. This Instruction does not apply to any of the adverse actions specified in Paragraph B above if the action:

1. Is based on a decision made by, or pursuant to specific instructions of the Civil Service Commission.

2. Is taken because of reduction-in-force, or any statute authorizing specific exception to the job protection procedures in 5 USC 7501.

3. Terminates a temporary promotion within a maximum period of two years and returns the employee to the position from which he was promoted or one of the same or higher grade or level.

4. Is taken against an employee serving under a term appointment on expiration of his term appointment.

IV. RESPONSIBILITIES

A. The Director of Personnel, ODASD(A), is responsible for:

1. Assuring that employees have a right to express their views;

2. Consulting with recognized labor organizations regarding appropriate aspects of this instruction;

3. Making copies of this Instruction available to employees, their representatives, veterans' organizations, and recognized labor organizations and notifying employees where copies are available for review;

4. Providing guidance and assistance to employees, supervisors, and management officials in the interpretation and application of this Instruction and governing rules and regulations;

5. Selecting a representative of management to participate in a Civil Service Commission hearing when appropriate.

B. *The Heads of Organizational Entities (i.e., Chairman of the Joint Chiefs of Staff, or his designee, DDR&E, ASD's or equivalent or his designee)* are responsible for reviewing the decision to effect an adverse action if the employee is otherwise excluded by Commission regulation from appeal (i.e., an employee in the excepted service who is not a preference eligible employee, except an employee with competitive status occupying a position in Schedule B of part 213 of the Civil Service Regulations) and so requests a review within 15 days of receipt of the action.

V. EMPLOYEE RIGHTS

A. An employee is entitled to a notice of the agency's decision concerning an adverse action at the earliest practical date. The decision to effect an adverse action shall be made by a higher level official of the agency when that exists, than the official who proposed the adverse action. The decision of the agency will be delivered at or before the time the action will be made effective. The notice shall be in writing, be dated and inform the employee of his right, if any, of appeal to the Commission. Appeals will be made to the appropriate office of the Commission not later than 15 days after the effective date of the action. For the Washington, D.C. metropolitan area the address is as follows:

Federal Employee Appeals Authority
U.S. Civil Service Commission
Washington, D.C. 20415

B. An employee has the right to select a representative to accompany, represent, and advise him. The employee will be granted a reasonable amount of official time, if he is otherwise in a duty status, to prepare and present the appeal. When the employee elects to be represented

and he selects an employee from OSD or OJCS as his representative, the representative will also be entitled to a reasonable amount of official time, if he is otherwise in a duty status, to prepare and present the appeal.

VI. PROCEDURE

A. *Filing an Appeal.* An employee who is entitled to appeal to the Commission from an adverse action shall present his appeal in writing and set forth employee's reasons for contesting the adverse action with such offer of proof and pertinent documents as he is able to submit. The appeal must be filed not later than 15 days after the adverse action has been effected. The employee should identify the action being appealed, state the basis for the appeal and include his name, position title, grade and the organization to which assigned.

B. *Advice and Assistance.* Advice concerning the preparation or submission of appeals to the Civil Service Commission may be obtained by contacting representatives of the Personnel Management Division, Directorate for Personnel, ODASD(A), OASD(COMPTROLLER).

VII. RIGHT TO FURTHER APPEAL

An employee of the Agency may request reopening and reconsideration of any previous decision of the Federal Employee Appeals Authority if:

A. New and material evidence is available that was not readily available when the decision of the Appeals Officer (FEAA) was issued.

B. The previous decision of the Appeals Officer involved an erroneous interpretation of law or regulation, or a misapplication of established policy; or

C. The decision of the Appeals Officer is of a precedential nature involving new or unreviewed policy considerations that may have effect beyond the case at hand. Such requests should be addressed to:

Appeals Review Board
U.S. Civil Service Commission
Washington, D.C. 20415

VIII. ALLEGATIONS OF DISCRIMINATION OR UNFAIR-LABOR PRACTICES

Allegations of discrimination (EEO complaints) or unfair labor practices will be processed in accordance with the appropriate provisions of Part 713 or 771 respectively of the Commission's regulations and applicable instructions contained in Administrative Instructions No.s9, 31, 37 and 38.

IX. The provisions of this Instruction become effective September 9, 1974.

/s/ D. O. Cooke
Deputy Assistant Secretary of Defense

CODE OF FEDERAL REGULATIONS

Title 5 – Administrative Personnel

Chapter 1 – Civil Service Commission

* * *

PART 5 – REGULATIONS, INVESTIGATION, AND ENFORCEMENT (RULE V)

Sec.

5.1 Regulations.
5.2 Authority of the Commission to make investigations.
5.3 Officers and employees to furnish testimony.
5.4 Enforcement authority of the Commission.

Authority: The provisions of this Part 5 issued under 5 U.S.C. 3301, 3302.

Source: The provisions of this Part 5 appear at 28 F.R. 10024, Sept. 14, 1963, unless otherwise noted.

§ 5.1 Regulations.

(a) The Commission is authorized and directed to promulgate and enforce such regulations as may be necessary to carry out the provisions of the Civil Service Act and Rules, the Veterans' Preference Act, and all other applicable statutes or executive orders imposing responsibilities on the Commission.

(b) The Commission is authorized, whenever there shall be practical difficulties and unnecessary hardships in complying with the strict letter of its regulations, to grant a variation from the strict letter of the regulations if such variation is within the spirit of the regulations, and the efficiency of the Government and the integrity of the competitive service are protected and promoted: *Provided,* That whenever such a variation is granted the Commission shall record in the minutes of its proceedings (1) the particular practical difficulty or hardship involved, (2) what is permitted in lieu of what is required by regulation, (3) the circumstances which protect or promote the efficiency of the Government and the integrity of the competitive service, and (4) a statement limiting the application of the variation to the continuation of the conditions which gave rise to the variation: *Provided, further,* That similar variations shall be granted whenever similar conditions exist. All minutes approved under authority of this section shall be published in the Commission's annual report.

§ 5.2 Authority of the Commission to make investigations.

The Commission may make appropriate investigations to secure enforcement of the Civil Service Act, Rules and Regulations, including investigation of the qualifications and suitability of applicants for positions in the competitive service. It may require appointments to be made subject to investigation to enable the Commission to determine, after appointments, that the requirements of law or the Civil Service Rules and Regulations have been met. Whenever the Commission finds that an employee serving under such an appointment is disqualified for Federal employment, it may instruct the agency to remove him, or to suspend him pending an appeal from the Commission's finding: *Provided,* That when an agency removes or suspends an employee pursuant to the Commission's instructions, and the Commission, on the basis of new evidence or an appeal, subsequently reverses the initial decision as to the employee's qualifications and suitability, the agency shall, upon request of the Commission, restore the employee to duty.

§ 5.3 Officers and employees to furnish testimony.

All officers and employees in the executive branch, and applicants or eligibles for positions therein, shall give to the Commission or its authorized representatives all information and testimony in regard to matters inquired of arising under the laws, rules, and regulations administered by the Commission. Whenever required by the Commission, such persons shall subscribe such testimony and make oath or affirmation thereto before an officer authorized by law to administer oaths.

§ 5.4 Enforcement authority of the Commission.

(a) Whenever the Commission finds that any person has been appointed to or is holding a position in violation of the Civil Service Act, Rules or Regulations, or that any officer or employee in the executive branch has violated this order or any of the laws, rules or regulations administered by the Commission, it is authorized, after given due notice and opportunity for explanation to the officer or employee and the agency concerned, to certify the facts to the proper appointing officer with specific instructions as to discipline or dismissal or other corrective actions.

(b) Whenever the Commission finds that any officer or employee in the executive branch has failed to adhere to established policies, regulations, and standards relating to personnel management subject to the jurisdiction of the Commission, it shall instruct the agency head to take corrective action.

(c) Whenever, on the basis of an appeal by an employee, the Commission finds that its regulations prescribing procedures to be followed by agencies in connection with adverse actions for disciplinary reasons have not been followed, or that adverse action has been taken for political reasons except as may be required by law, or resulted from discrimination because of marital status, it shall instruct the agency to restore the employee to duty.

(d) Whenever the Commission issues specific instructions as to discipline or dismissal of an officer or employee, or to restore an officer or employee to duty, the appointing officer concerned shall comply with the Commission's instructions.

(e) If the appointing officer fails to carry out the instructions of the Commission issued under paragraph (a) of this section, the Commission shall certify the facts to the head of the agency concerned. If the head of the agency fails to carry out the instructions of the Commission within ten days after receipt thereof, the Commission shall certify the facts to the Comptroller General of the United States, and shall furnish a copy of such certification to the head of the agency concerned; and thereafter no payment shall be made of the salary or wages accruing to the employee concerned.

No. 76-1599

Supreme Court, U. S.
FILED
AUG 24 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

HELEN A. PRYOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1599

HELEN A. PRYOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges her removal from federal employment for insubordination based on her failure to submit to a psychiatric evaluation as part of a fitness-for-duty examination.

On March 8, 1972, petitioner was requested by the Director of Personnel, Office of the Secretary of Defense, to report for a fitness-for-duty examination, including both a physical examination and a psychiatric evaluation (Pet. App. F). The letter stated that petitioner could choose her own physician if she preferred and that she could name a representative to assist her. Petitioner reported for the physical examination on March 16, 1972, but she did not submit to psychiatric evaluation (Pet. App. E 20a). On a return visit, the examining physician, Dr. Mayer, suggested

to petitioner that she see the staff psychiatrist, but she failed to do so (App. C).[1]

Based on Dr. Mayer's observations,[2] Dr. Pease, the Director of the Health Service, recommended that petitioner be evaluated by a psychiatrist before any final determination regarding her fitness for duty was made (App. D). The Director of Personnel again asked petitioner to report for a psychiatric evaluation on April 25, 1972; again she was given the option of naming her own psychiatrist and a representative to assist her (Pet. App. G). Petitioner named a representative but failed to report for the scheduled evaluation (Pet. App. E 21a-22a).

A final attempt, in June 1972, to have petitioner undergo psychiatric evaluation also was unsuccessful (Pet. App. H). In August 1972, a request was submitted to the Civil Service Commission for petitioner's disability retirement but was dismissed because petitioner failed to cooperate with the medical officer (Pet. App. D 10a-11a).

---

[1]"App." refers to the appendix to the government's motion for summary judgment in the Court of Claims.

[2]Dr. Mayer's impressions were summarized in his report as follows (App. C):

> While here, I tried to convince her that talking with our psychiatrist, Dr. Bache, would be to her advantage. But Mrs. Pryor began to talk some kind of law suit which she has against the labor department, and that her private doctor told her not to talk with anybody about it except with her lawyers. She says she has 4 lawyers who help her in the suit.
>
> * * * * *
>
> My general impression is that Mrs. Pryor must have many unresolved unconscious conflicts which make her emotionally maladapted. Her thinking and judgment seems [sic] to be impaired; she is accident prone, and she appears to have false beliefs. Her attitude toward her previous accidents also includes an element of compensation neurosis.

On July 17, 1973, petitioner was sent a Notice of Proposed Removal on grounds of insubordination based on her "refusal to submit to a psychiatric evaluation as part of a fitness-for-duty examination" (Pet. App. I 32a).[3] The Notice detailed the facts supporting the charge of insubordination, informed petitioner that she had a right to reply to the charge personally or in writing or both, and stated that she had a right to review the materials on which the agency was relying (Pet. App. I). Petitioner did obtain access to the materials on which the agency relied but was denied access to other requested material that the agency deemed irrelevant to the issue (Pet. App. D 10a).

On October 4, 1973, petitioner was notified that the grounds for removal stated in the July 17 Notice had been found to be supported by the evidence (Pet. App. J) and that she would be removed effective October 12, 1973. Petitioner then appealed to the Appeals Examining Office, Civil Service Commission, which, after a two-day hearing, denied her appeal, finding that there were no procedural defects and that substantial evidence supported the ground for removal (Pet. App. E).

A second appeal, to the Board of Appeals and Review, Civil Service Commission, was also denied on June 7, 1974. The Board found that no procedural rights were violated by the agency or by the hearing examiner and that the removal was not an unduly harsh penalty (Pet. App. D). The Court of Claims sustained the removal (Pet. App. C).

---

[3]The Civil Service Commission had held that a previous removal in March 1973 on the same charge was procedurally defective and petitioner was reinstated effective July 16, 1973.

The Court of Claims' decision, affirming the dismissal of petitioner for insubordination, is correct, does not conflict with a decision of any other court of appeals, and does not warrant further review.

Petitioner was removed from her position for insubordination because of her failure to submit to a psychiatric evaluation. Her refusal to submit to the evaluation is not disputed and is amply demonstrated by the record. At the time of her physical examination in March 1972, she refused a psychiatric examination; in April 1972 she failed to keep an appointment for a psychiatric evaluation; and in June 1972 she did not even respond to a request that she report for a psychiatric evaluation. Removal based on insubordination for refusal to submit to a fitness-for-duty examination is a legitimate exercise of agency authority. *Yates* v. *Manale*, 377 F. 2d 888 (C.A. 5).

Petitioner contends, however, that her removal was nonetheless invalid because she was not given an adequate opportunity at her post-removal hearing to challenge the basis on which she was ordered to undergo a fitness-for-duty examination.[4] Although the government must act with some rational basis when it orders a fitness-for-duty

[4]Petitioner apparently does not contend that she must be given an opportunity to challenge the order before her removal. Indeed, this Court's decision in *Arnett* v. *Kennedy*, 416 U.S. 134, forecloses such a contention. "[T]he government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch." *Id.* at 168 (Powell, J.). The mere order to undergo a fitness-for-duty examination, which petitioner after all might have passed, itself does not impose a stigma amounting to an infringement of a constitutionally protected liberty interest. Cf. *Bishop* v. *Wood*, 426 U.S. 341; *Paul* v. *Davis*, 424 U.S. 693. The principal issue, therefore, is whether petitioner in this case was entitled to challenge the grounds for the order at her post-removal hearing.

examination, and correspondingly when it orders removal for a failure to comply (*Drucker* v. *United States*, 498 F. 2d 1350 (Ct. Cl.); *Grover* v. *United States*, 200 Ct. Cl. 337, 344), the government is entitled to a presumption that its employees act in good faith (*Drucker* v. *United States*, *supra*, 498 F. 2d at 1352). In the absence of any objective evidence to rebut that presumption, we do not believe that each employee dismissed for insubordination is entitled to compel a full-scale inquiry into the grounds for an order from her superiors. Were the rule otherwise, any dissatisfied employee could provoke a time-consuming investigation of collateral matters and thereby disrupt the normal efficiency of office procedure.

In any event, as the Court of Claims noted (Pet. App. C 5a-6a), the record in this case belies the suggestion that the examination orders were motivated by bad faith. The doctor who examined petitioner in April 1972 suggested to her that psychiatric counseling would be advantageous (see p. 2, *supra*), and, based on that opinion, a recommendation that petitioner undergo a psychiatric examination was forwarded to her supervisors. On April 10, 1972, a letter was sent to petitioner setting forth that recommendation and ordering her to take the examination (Pet. App. G). Petitioner nevertheless refused to obey that order and subsequent orders to the same effect.[5]

[5]The initial letter directing petitioner to take a physical and psychiatric examination was sent on March 8, 1972, before petitioner had been examined by Dr. Mayer. Although we see no basis for believing that the March 1972 order was in any way motivated by bad faith, we note that petitioner was not dismissed until she had refused to obey several subsequent orders to have a psychiatric examination, issued after Dr. Mayer had examined her and Dr. Pease had made that recommendation.

This insubordination, especially in view of the independent medical recommendations, was sufficient grounds for her dismissal.

2. Without raising the issue in the "Questions Presented" section of her petition, petitioner suggests (Pet. 11) that her removal did not comply with applicable agency and Civil Service regulations. Under Rule 23(1)(c) of the Rules of this Court, that issue is not properly before this Court. In any event, petitioner's contention is contrary to the findings of the Board of Appeals and Review (Pet. App. D 9a-13a) and the Court of Claims (Pet. App. C 6a-7a) and does not present an issue meriting review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

AUGUST 1977.

DOJ-1977-08

Supreme Court, U. S.
FILED
SEP 20 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

76-

No. [redacted]-1599

HELEN A. PRYOR,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS

PETITIONER'S REPLY MEMORANDUM

ALBERT A. RAPOPORT
1108 National Press Building
Washington, D.C. 20005
(202) 783-1140

Attorney for Petitioner

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1599

HELEN A. PRYOR,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS

PETITIONER'S REPLY MEMORANDUM

The United States in its memorandum in opposition, p. 1, states that petitioner reported for the physical examination on March 16, 1972 but she did not submit to psychiatric evaluation and, on p. 4, that at the time of her physical examination in March, 1972 she refused a psychiatric examination. This falsely and erroneously implies that petitioner was asked to submit to a psychiatric evaluation or was supposed to do so on that date, or as a result of the physical examination on that date. *See* Petitioner's Affidavit Concerning Documents and Events Leading Up to Removal and in Support of Petition of Payment of

Wages, p. 14, as well as Affidavit (of petitioner) in Support of Opposition to U. S.'s Motion for Summary Judgment and in Support of Petitioner's Motion for Summary Judgment, p. 15, which are part of record below, and which have never been controverted herein. The United States also states, pp. 1-2, that on a return visit the examining physician, Dr. Mayer, suggested to petitioner that she see the staff psychiatrist, but she failed to do so. Petitioner's Affidavit Concerning Documents, etc., p. 14, denies that on a return visit of March 25, 1972, bringing a specimen to a nurse, that she saw or talked to Dr. Mayer, or that on another return visit of April 3, 1972, to report to the nurse for a recheck of vision, pp. 17-18, that any conversation giving rise to Dr. Mayer's observations or impressions noted by the United States on p. 2 of its memorandum in opposition ever took place. Also, *see* Affidavit (of petitioner) in Support of Petitioner's Opposition, etc., p. 15.

Dr. Mayer, the *examining* physician, never specifically "recommended" that petitioner be evaluated by a psychiatrist, and in fact had told petitioner that she did not need to be so evaluated on the date of the physical examination of March 16, 1972, and Dr. Pease, who did recommend that petitioner be given a psychiatric evaluation was *not* the *examining physician, as was "required" by CSC and agency regulations — and he never saw nor observed petitioner* (*see* Pet. App. P., p. 107a; Pet. App. O, pp. 94a-95a).

The U.S. on p. 2 of its memorandum in opposition states petitioner was asked to report for a psychiatric evaluation on April 25, 1972 and named a representative but failed to report. These allegations are completely in error with the record and petitioner's said Affidavit in Support of Opposition, etc., p. 19, in that petitioner never received the notice until late April 24, 1972, and did not then or on the date of the proposed examination have a personal representative as required by CSC and agency regulations (Pet. App. O, p. 95a; Pet. App. P, p. 102a); nor was there a letter of record at that time from anyone designated as the personal representative of petitioner.

The U. S. in its memorandum in opposition then states on p. 2, that a final attempt in June, 1972 to have petitioner undergo psychiatric evaluation also was unsuccessful, is contradicted by the Affidavit (of petitioner) in Support of Opposition etc., pp. 15-16, stating she was on sick leave without pay approved by her supervisor from June to September 18, 1972 and under a doctor's care, as a result of the duress and harassment thrust upon her by the agency.

The submission to CSC for petitioner's disability retirement, which was dismissed because of petitioner's alleged failure to cooperate with the medical officer, was dismissed in error. (*See Pet. App. O*, p. 70a, to the effect that the agency should continue to process the application on the basis of other available evidence, and Digest of Significant Decisions, U.S. CSC Vol. II, No. 12, 8/76, PH 752B60254; *see also In the Matter of John W. King, Administrative Law Judge, Social Security Administration, Dept. of HEW, before the USCSC*, Docket No. 5, July 21, 1977.)

Yates v. Manale, 377 F.2d 888 (C.A. 5), cited by the U. S. as prime authority for removal based on insubordination for refusal to submit to a fitness-for-duty examination, is easily distinguishable by its facts from the instant case. *Yates* involved a request to take a medical examination, presumably only a physical examination, not a psychiatric evaluation; Yates refused in writing to do so; the procedures and agency and CSC and regulations are vastly different where a mental condition is suspected in a federal non-probational employee, as petitioner, as has been shown through the content of the Petition for Writ of Certiorari. Indeed, in a concurring opinion in *Yates*, Judge Young thought justice would not result unless the case was returned to the agency to determine if the federal employee was responsible for her action in refusing to submit to the examination.

The U. S. cites *Arnett v. Kennedy*, 416 U.S. 134, involving a federal employee, and other cases which have absolutely nothing to do with federal employees nor fitness-for-duty examinations,

as if the federal government as an employer has unlimited authority to request and/or order a non-probationary federal employee to undergo a psychiatric evaluation.

It is the contention and thrust of petitioner's argument that such authority of the federal government is not unlimited or absolute, as in a totalitarian state, or the exercise thereof becomes violative of the Constitutional rights of federal employees, and especially where the federal government violates and disregards its own rules and regulations as it has repeatedly been demonstrated herein by petitioner.

The issues of the failure of the federal government to comply with applicable agency and CSC regulations are properly before this Court under Rule 23 1(c), since they are fairly comprised within the statements of the questions presented. Indeed, these issues merit review by this Court, affecting the nearly three million civilian employees of the federal government, and in response to the large number of complaints received from them concerning the abuse and misuse of the fitness-for-duty process. *See* Report Ad Hoc Hearings on Fitness for Duty Examinations, chaired by Congressman Walter E. Fauntroy, June 29 and July 1, 1976.

It is, therefore, respectfully submitted that the Petition for a Writ of Certiorari be granted.

/s/ ALBERT A. RAPOPORT
ALBERT A. RAPOPORT
1108 National Press Building
Washington, D.C. 20005
(202) 783-1140

Attorney for Petitioner

September, 1977